Supreme Court, U.S.
FILED
08 943 NOV 21 2008
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JOHN L. RICH,

Petitioner

v.

JAMES J. KENNY, ET. AL.,

Respondents.

On Petitioner For Writ of Certiorari To The Utah State Court of Appeals

---

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

Denver C. Snuffer, Jr. (3032)
NELSON, SNUFFER, DAHLE
& POULSEN, P.C.
10885 South State
Sandy, UT 84070
Telephone: (801) 576-1400

QUESTIONS PRESENTED FOR REVIEW:

- Did the Utah Court of Appeals err in affirming the trial court's assertion of jurisdiction over issues of whether Rich made a timely request for arbitration under the Declaration and whether he waived the arbitration in light of this Court's decision in Preston v. Ferrer?

- Did the Utah Court of Appeals err in affirming the trial court's determination that the Court ordered arbitration and subsequent agreement to arbitrate was invalid and the HOA was entitled to an award of attorney's fees in light of the trial court's lack of jurisdiction over the case?

LIST OF ALL PARTIES

The parties to this matter include John L. Rich, as Petitioner, and James J. Kenny; Patricia D. Kenny; James E.B. Stuart; Eileen A. Stuart; Robert C. Slettom; Richard L. Measelle; Chase Peterson; Grethe B. Peterson; and Thaynes Canyon 1 Homeowners Association, an unincorporated association as Respondents.

CORPORATE DISCLOSURE STATEMENT

This appeal is not made by or in behalf of any corporation. Therefore, there is no parent or publicly held company owning 10% or more of the corporation's stock relevant to this matter.

UNITED STATES SUPREME COURT

John L. Rich v. James J. Kenny, et. al.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW. i

LIST OF ALL PARTIES. ii

CORPORATE DISCLOSURE STATEMENT. ii

TABLE OF CONTENTS. iii

TABLE OF CITED AUTHORITIES. v

CITATIONS OF REPORTS AND ORDER. viii

STATEMENT OF JURISDICTION. 1

CONSTITUTIONAL PROVISIONS. 2

STATEMENT OF THE CASE. 4

I. Facts. 5

ARGUMENT. 12

I. Did the Utah Court of Appeals Err in Affirming the Trial Court's Jurisdiction over issues of whether Rich made a Timely Request for Arbitration under the Declaration and whether he waived the arbitration, in light of

this Court's decision in Preston v. Ferrer?. . 12

A. Does the Declaration Constitute a Contract Involving a Transaction in Commerce As Required by the Federal Arbitration Act?. 16

B. Did the Utah Court of Appeals Err in Affirming the Trial Court's Jurisdiction Over Questions Reserved for the Arbitrator? 18

II. Did the Utah Court of Appeals err in affirming the trial court's determination that the subsequent agreement to arbitrate was invalid and the HOA was entitled to an award of attorney's fees, in light of the trial court's lack of jurisdiction over the case?. 20

CONCLUSION AND STATEMENT OF RELIEF SOUGHT. 23

CERTIFICATE OF COMPLIANCE. 25

CERTIFICATE OF SERVICE. 26

APPENDIX

1. Court of Appeals Decision Kenny v. Rich, 2008 UT App 209

2. Memorandum Decision dated March 16, 2007 (Lubeck).

3. Federal Arbitration Act, 9 U.S.C. §1, et seq.

4. Trial court decision setting aside arbitration award dated October 6, 2005.

5. Memorandum in Support of Defendant's Renewed Motion to Dismiss.

6. Trial court decision granting preliminary injunction dated November 4, 2005.

TABLE OF CITED AUTHORITIES

CASES

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006). 14, 19, 20

Kenny v. Rich,
186 P.3d 989 (Utah App. 2008). 1, 18

Preston v. Ferrer,
145 Cal. App. 4th 440 (2006). 16

Preston v. Ferrer,
552 U.S. ___, 128 S.Ct. 978 (February 28,
2008). 11, 12, 14, 15, 16, 18, 19, 20

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
338 U.S. 395 (1967). 14, 20

Southland Cor. v. Keating,
465 U.S. 1 (1984). 13

CONSTITUTIONS, STATUTES, RULES

California Talent Agencies Act, Cal. Lab. Code Ann.
§1700 et seq. (West 2003 and Supp. 2008). . 15

Federal Arbitration Act, 9 U.S.C. §1. . . . . 1, 17

Federal Arbitration Act, 9 U.S.C. §1, et seq. . . 11, 14

Federal Arbitration Act, 9 U.S.C. §2. 12

Utah Code Ann. §78-31a-107(3) (2002). 13

Utah Code Ann. §78B-11-107 (2002). 19

OTHER CITATIONS

None.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

Kenny v. Rich, 186 P.3d 989 (Utah App. 2008).

John L. Rich, Petitioner ("Rich") for his opening brief states:

STATEMENT OF JURISDICTION

(i) The date the judgment or order sought to be reviewed was entered.

The Court of Appeals of the State of Utah issued a written decision on this matter on May 30, 2008, in this case, under the citation Kenny v. Rich, 186 P.3d 989 (Utah App. 2008).

The Utah Supreme Court denied Petitioner's Petition for Certiorari on September 29, 2008.

(ii) Statutory provision allowing appeal.

28 U.S.C. § 1257(a) provides jurisdiction to appeal this matter to the United States Supreme Court.

APPLICABLE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

9 U.S.C. § 1

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall

be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Utah Code Ann. §78B-11-107 (2002)

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

STATEMENT OF THE CASE

This case asks the question whether an arbitration provision contained within the Declarations of Protective Covenants of a Homeowner's Association should be enforced in a suit brought by the Association and certain individuals to stop the construction of an addition to Rich's home in the Thaynes Canyon I Subdivision in Park City, Utah.

Rich is a resident of California and has asserted from the commencement of the litigation that the Third District Court lacked jurisdiction over the subject matter of this case because of a mandatory arbitration provision within the Thaynes Canyon I Subdivision Declaration of Protective Covenants (the "Declaration") upon which the suit by the Homeowner's Association ("HOA") is based and

because service of the Summons and Complaint on Rich was defective.

I. FACTS

In July, 2005, Rich began a construction remodel to his home in the Thaynes Canyon Subdivision. Kenny, 186 P.3d at 994. The construction plans indicated that the addition to Rich's home would extend to a point 6.8 feet from the neighboring property line. Id. The neighbor informed the HOA of the proposed construction and, thereafter, this same neighbor gave Rich a copy of the Declaration, which required all buildings to be set back ten feet (10') from the lot line. Id.

Rich responded that he would not comply with the Declaration's ten-foot setback requirement because Park City required only a five-foot set back. Id. Park City gave Rich a building permit with the

6.8 foot side-yard setback and he began construction. R. 798; Kenny, 186 P.3d at 994.

In response to the HOA's oral demand to halt construction, on August 29, 2005, Rich hand-delivered a letter to the HOA demanding arbitration of the alleged violation of the Declaration. Id. At 995. The HOA thereafter filed suit against Rich and sought an immediate Temporary Restraining Order ("TRO") to enjoin Rich from constructing the home remodel in violation of the Declaration. Id. Rich did not answer the complaint; instead, on the day of the TRO hearing, Rich filed a motion to quash the summons and a motion to dismiss the complaint. Id.

The motion to quash asserted that Rich had not been properly served with the summons and complaint. Id. The motion to dismiss asserted that the Declaration required that all disputes between

the HOA and its members be resolved through arbitration. Id.

The trial court granted the TRO and ordered the parties to submit to arbitration. Id. at 995. Pursuant to the terms of the Declaration, an arbitration panel was selected and the parties each signed an acknowledgment provision as part of the arbitrators' engagement letter.[1] Id. In spite of the TRO, Rich continued with the remodel work on his home. Id.

Pursuant to the agreement to arbitrate, the HOA paid the arbitration fees, answered discovery and submitted a pre-hearing brief with exhibits to the panel. R. 89, Ex. 2, ¶ 4 pg. 3. However, the day before the scheduled arbitration, the HOA filed an ex

[1] The Acknowledgment states: "Counsel for the parties acknowledge and agree that the above referenced matter may be arbitrated in accordance with the Utah Revised Uniform Arbitration Act and accept the arbitration panel as on the terms and as provided for in this letter."

parte motion with the trial court seeking to cancel the arbitration. Kenny, 186 P.3d at 995. The HOA filed a corresponding motion with the arbitration panel on the same day. R. 89, Ex. 2, ¶ 7 pg. 3; see Addendum 5. The trial court granted the ex parte order to show cause from the HOA and cancelled the arbitration. Kenny, 186 P.3d at 995. Notwithstanding, on the day of the scheduled arbitration, Rich and the arbitration panel went forward with the arbitration without the participation of the HOA. Id.

By a unanimous decision, the three-member arbitration panel, concluded that the panel had jurisdiction independent of the Third District Court, and that their authority was derived from a written agreement to arbitrate. Id. The panel concluded that the Court's decision did not affect the authority of

the arbitration panel to rule on the matter before it. Therefore, the panel determined to proceed. Id.

The panel telephoned the attorney for the HOA to inform him of its decision to continue and invited him to appear. Counsel declined and said neither he nor his clients would appear. R. 89, Ex. 2, ¶ 11 pg. 4.

Thereafter, despite the absence of the HOA, the hearing proceeded. Kenny, 186 P.3d at 995. The arbitration panel considered the HOA's pre-hearing brief and exhibits and other submissions from HOA's counsel. R. 89, Ex. 2, Introduction pg. 1.

The arbitration panel issued a written decision that Rich was entitled to a variance from the setback provision in the Declaration. Kenny, 186 P.3d at 995. Rich filed the arbitration decision with the trial court along with a renewed motion to dismiss. Id.

The trial court conducted a hearing, as a result of which the trial court set aside the decision of the arbitration panel, found that it had superior jurisdiction, and decided that, although the summons was facially defective under Rule 12 of the Utah Rules of Civil Procedure, service of the summons and complaint on Rich was proper. Id. at 995-96. A copy of the relevant court rulings is found in the Appendix hereto as Addendum 4.

Rich's request for an interlocutory appeal was denied and the matter proceeded to trial. Id. at 996. Following a bench trial, a permanent injunction was granted to the HOA prohibiting Rich from encroaching on the ten-foot setback and awarding the HOA its attorneys' fees and costs. Id.; See Addendum 4.

Rich initiated an appeal to the Utah Supreme

Court, which appeal was transferred to the Court of Appeals. The Court of Appeals, Judges Greenwood, Bench and Orme, found for the HOA on all counts and affirmed the trial court's ruling. See Kenny, 186 P.3d 209, at Addendum 1.

After the appeal had been fully briefed and argued, but before the Court of Appeals issued its decision, the United States Supreme Court decided the case of Arnold M. Preston v. Alex E. Ferrer.[2] The U.S. Supreme Court held in Preston that when parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative. Preston v. Ferrer. 128 S.Ct. 978 at 987. The Utah Court of Appeals did not

[2] Preston v. Ferrer, 552 U.S. ___; 128 S.Ct. 978 (decided February 20, 2008).

have the opportunity to consider the Preston case nor did its decision address the U.S. Supreme Court's ruling. The Utah Court of Appeals issued its decisions, affirming the trial court in all respects.

Rich then filed a Petition for Writ of Certiorari with the Utah Supreme Court. The petition set forth similar issues for determination, but Rich also included the applicable law from Preston v. Ferrer. The Utah Supreme Court declined the writ. This decision was in error, as neither the Utah Court of Appeals nor the Utah Supreme Court addressed this Court's ruling in Preston.

ARGUMENT

I. Did the Utah Court of Appeals Err in Affirming the Trial Court's Jurisdiction over issues of whether Rich made a Timely Request for Arbitration under the Declaration and whether he waived the arbitration, in light of this Court's decision in Preston v. Ferrer?

Congress announced a national policy favoring

arbitration when it passed the Federal Arbitration Act. Section 2 of the FAA states:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2 (emphasis added). This Court reiterated the importance of arbitration by stating a national policy favoring arbitration of claims that parties contract to settle in that manner. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). That national policy applies in state as well as federal courts and forecloses state legislative attempts to undercut the enforceability of arbitration agreements. Id. at 16.

Most jurisdictions across the United States have similar policies favoring the use of arbitration as an alternative to litigation. Utah has one such

policy. The Utah Uniform Arbitration Act ("UUAA") provides that "[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." Utah Code Ann. §78B-11-107(3) (2002).

Further, any challenges to the validity of a contract requiring arbitration of disputes ordinarily "should...be considered by an arbitrator, not a court." Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006). Although many courts have disputed the question of who should decide whether "grounds...exist at law or in equity" to invalidate an arbitration agreement, this Court has repeatedly held that attacks on the entire contract's validity are within the arbitrator's purview. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (applicable in federal court); Buckeye Check

Cashing, Inc., 546 U.S. at 446 (applicable in state court).

Moreover, this Court's recent decision in Preston v. Ferrer, 552 U.S. ___; 128 S.Ct. 978 (2008), reaffirms the decision in Buckeye and holds that when parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative. Id. at 987.

Preston involved the application of an arbitration provision in an entertainment management contract. Preston (a California lawyer who renders services to persons in the entertainment industry) sought payment of his fees allegedly due under the Contract. Preston invoked the arbitration provision of the Contract. Ferrer (a former trial court judge from Florida who appears as "Judge

Alex" on Fox Television) filed a petition with the California Labor Commission charging that the Contract was invalid because Preston was acting as an unlicensed talent agent in violation of California law.[3]

The Labor Commission accepted the Petition and allowed Ferrer to pursue his claim in Los Angeles Superior Court. Preston moved to compel arbitration. The trial judge denied Preston's motion and Preston appealed. The California Court of Appeals affirmed the trial court decision holding that the CTAA vests exclusive jurisdiction in the Superior Court over the dispute of the Labor commission.[4] Preston's appeal to the California Supreme Court was denied.

The U.S. Supreme Court granted certiorari. The dispositive issue before the U.S. Supreme Court

---

[3] See California Talent Agencies Act ("CTAA") Cal. Lab. Code Ann. §1700 et seq. (West 2003 and Supp. 2008).

[4] Preston v. Ferrer, 145 Cal. App. 4th 440, 447 (2006).

was "who decides whether Preston acted as a personal manager or as a talent agent." 128 S.Ct. at 982. The U.S. Supreme Court found that the FAA supersedes any state law that vests primary jurisdiction in any forum other than arbitration, when the parties have agreed to arbitrate all questions arising under a contract. Id at 990.

A. Does the Declaration Constitute a Contract Involving a Transaction in Commerce As Required by the Federal Arbitration Act?

The Federal Arbitration Act applies to contracts involving maritime transactions and transactions in commerce. A transaction in commerce is "among the several States...or in any Territory of the United States...or between any such Territory and any State or foreign nation." 9 U.S.C. § 1. Here, the Declaration and arbitration clause involved interests in real property, including the buyers and sellers of real estate and the

improvements of such real estate. It further governed the ability of persons owning the real estate to construct and remodel real estate, using professional services and the sale of materials necessary for the construction and remodel of the real estate. These services involved the interstate transfer of materials and continuing operation of the services. Therefore, it is a contract involving transactions in commerce.

It is further undisputed that Rich is a resident of California. The home being remodeled was in Utah, and payments for said remodel were made from California. Again evidencing transactions in interstate commerce.

B. Did the Utah Court of Appeals Err in Affirming the Trial Court's Jurisdiction Over Questions Reserved for the Arbitrator?

Because the Declaration is a contract involving interstate commerce, it is governed by the

Federal Arbitration Act and, according to Preston v. Ferrer, any questions relating to the contract should have been submitted to the arbitrator for determination. However, in this case, the trial court asserted jurisdiction over the case, disregarding the arbitration panel's decision that the arbitration clause was enforceable and required arbitration of the dispute. Kenny v. Rich, 186 P.3d 989, 997-98(Utah App. 2008). The trial court determined that Rich did not make a timely request for arbitration, thereby ruling the arbitration clause was unenforceable. Id. The Utah Court of Appeals upheld the trial court, finding that Rich waived his right to arbitration by failing to request it within the 30-day time period. Id. at 998-99.

These decisions conflict with Buckeye and Preston, and the provisions of the FAA. Further, the UUAA is consistent with this Court's decision in

Preston. The power to determine the existence or validity of a contract of which an arbitration clause forms a part lies with the arbitrator. Preston, 128 S.Ct. 793; see UUAA, §78-31a-107(3). The trial court does not have jurisdiction to determine the validity of provisions within the Declaration. The trial court should not have decided whether the contract required arbitration and whether Rich waived arbitration, as it was directly contrary to Buckeye, and the Utah Court of Appeals should have reversed, particularly in light of the holding in Preston.

The determination of the condition precedent of whether Rich had made a timely request for arbitration was an issue relating to the Declaration itself and should have been made by the arbitration panel, as all questions relating to and arising under the Declaration are specifically reserved for the

arbitrator. Preston, 128 S.Ct. at 990; see also Buckeye, 546 U.S. at 446; Prima Paint, 388 U.S. at 403-04. Therefore, the application of Preston to this case requires a reversal of the trial court and a remand with instructions that the arbitration award be upheld and the trial court's decision be vacated for lack of jurisdiction.

II. Did the Utah Court of Appeals Err in affirming the Trial Court's Determination that the subsequent agreement to arbitrate was invalid and the HOA was entitled to an award of Attorney's Fees, in light of the Trial Court's lack of Jurisdiction over the case?

In addition to the foregoing argument that the decision by this Court in Preston requires a remand to the trial court for an order affirming the arbitration award, the Court of Appeals' decision affirming the trial court's decision should be reversed because the trial court lacked jurisdiction over Rich to rule that the subsequent agreement to arbitrate was not binding on the HOA and to award attorney's

fees to the HOA.

The record fails to support a finding that valid service of process was ever made on Rich such that he was a proper party to the proceedings before the trial court. R. 364-368; See Addendum 6. If Rich is not at home, he does not have a "resident" at his home upon whom service could have taken place. Id. He is a widower, who lives alone after the death of his wife. Id. There isn't anyone matching the testimony of the process server to whom the alleged service could have been delivered.

Mr. Rich's son testified under oath that when Mr. Rich is traveling he (Mr. Rich's son) checks the house every day and that on one occasion the "service" was in the mailbox and on another it was on the porch. R. 366-67; See Addendum 6. The fact that Mr. Rich lives alone and no one else is in the house was confirmed by his daughter in her testimony and

by Mr. Rich's affidavit. It was prejudicial for the trial judge and the Court of Appeals to dismiss this direct evidence in favor of a presumption in favor of a process server who was paid for not doing his job. The Court of Appeal's labeling of family members' consistent testimony as "self-serving" ignores the seriousness of the oath taken when called to testify or swear to the truthfulness of the statement. The affidavits are no more self-serving than the process server's return of service.

Therefore, the Court lacked jurisdiction to decide whether the subsequent agreement to arbitrate was invalid and to decide whether the HOA was entitled to attorney's fees. These determinations exceeded the scope of the trial court's jurisdiction. The case should have been sent to arbitration first to determine issues arising under the Declaration. However, this was not done. Therefore, this Court

should grant certiorari and reverse and remand to the trial court with instructions that the arbitration award be upheld and the trial court's decision be vacated for lack of jurisdiction.

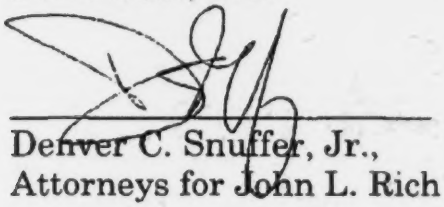
CONCLUSION AND STATEMENT OF RELIEF REQUESTED

The United States Supreme Court should grant certiorari in this matter because the panel of the Utah Court of Appeals has decided a question of law in a way that is in conflict with a decision of the United States Supreme Court. This Court's decision in Preston v. Ferrer requires that when the parties have agreed to arbitrate all disputes arising under a contract, then decisions such as whether a condition precedent to arbitrability has been fulfilled must be made by an arbitrator. The trial court cannot divest that authority from the arbitrator. Therefore, this Court should grant certiorari and reverse and

remand to the trial court with instructions that the arbitration award be upheld and the trial court's decision be vacated for lack of jurisdiction.

Dated this 19 day of November, 2008.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.



Denver C. Snuffer, Jr.,
Attorneys for John L. Rich

APPENDIX

1. Utah Supreme Court Order denying certiorari 2

2. Court of Appeals Decision Kenny v. Rich, 2008 UT App 209. 4

3. Memorandum Decision dated March 16, 2007 (Lubeck). 32

4. Federal Arbitration Act, 9 U.S.C. §1, et seq.. 68

5. Trial court decision setting aside arbitration award dated October 6, 2005.. 84

6. Memorandum in Support of Defendant's Renewed Motion to Dismiss.. 115

7. Trial court decision granting preliminary injunction dated November 4, 2005. 130

1. Utah Supreme Court Order denying certiorari.

IN THE SUPREME COURT OF STATE OF UTAH

---oo0oo---

James J. Kenny; Patricia D. Kenny; James E.B. Stuart; Eileen A. Stuart, Robert C. Slettom; Faye Slettom; Richard L. Measekke; Chase Peterson; Grethe P. Peterson; and Thaynes Canyon 1 Homeowners Association, an unincorporated association,

Plaintiffs and Appellees,

v. Case No. 20080542-SC

John L. Rich,

Defendant and Appellant.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on June 27, 2008. The State filed a letter in response to the petition ofn July 21, 2008.

IT IS HEREBY ORDERED pursuant to Rule 51(a) of the Utah Rules of Appellate Procedure the

Petition for Writ of Certiorari is denied.

For The Court:

Dated: 9-17-08

/s/ Matthew B. Durrant
Matthew B. Durrant
Associate Chief Justice

2. Court of Appeals Decision Kenny v. Rich, 2008 UT App 209, 186 P.3d 989 (Ut. Ct. App. 2008).

James J. KENNY; Patricia D. Kenny; James E.B. Stuart; Eileen A. Stuart; Robert C. Slettom; Faye Slettom; Richard L. Measelle; Chase Peterson; Grethe B. Peterson; and Thaynes Canyon 1 Homeowners Association, an unincorporated association, Plaintiffs and Appellees, v. John L. RICH, Defendant and Appellant.

No. 20070391-CA.

Utah Court of Appeals.

May 30, 2008.

Appeal from the Third District, Silver Summit Department, Bruce C. Lubeck, J.
Page 990

Denver C. Snuffer Jr. and Bret W. Reich, Sandy, for Appellant.

Erik A. Olson and Thomas J. Burns, Salt Lake City, for Appellees.

Before GREENWOOD, P.J., BENCH and ORME, JJ.
OPINION BENCH, Judge:

¶ 1 Defendant John L. Rich appeals from a preliminary injunction issued against him and an award of attorney fees entered in favor of his homeowners association and the above-named Plaintiffs (collectively, the Page 994 HOA). Rich challenges the district court's (1) conclusion that he

waived his right to arbitrate the dispute, (2) vacation of the arbitration award for lack of an agreement to arbitrate, (3) assertion of jurisdiction over him in light of problems with the HOA's service of process, (4) decision to proceed with a bench trial rather than a jury trial, (5) failure to require the HOA to post a bond at the time a temporary restraining order was issued against him, (6) conclusion that the HOA was entitled to attorney fees, and (7) calculation of the HOA's reasonable attorney fees. We affirm and remand for an award to the HOA of attorney fees it has reasonably incurred on appeal.

BACKGROUND

¶ 2 Rich owns property that is part of the Thaynes Canyon Subdivision (the Subdivision) in Park City, Utah. Property in the Subdivision is subject to the conditions, covenants, and restrictions outlined in the Subdivision's Declaration of Protective Covenants (the Declaration). The Declaration contains a provision that requires a ten-foot setback from side and rear lot lines for any buildings and structures.

¶ 3 On July 19, 2005, Michael DeCarlo, Rich's architect and son-in-law, brought plans for an addition to Rich's home to James Stuart, a trustee of the HOA. These plans indicated that the addition to Rich's home would be 6.8 feet from Stuart's property line. Stuart objected to the plans on the basis that they violated the Declaration's provision that required all buildings to be set back ten feet from the lot line. The next day, Stuart gave DeCarlo a copy of the Declaration, and DeCarlo stated that he would not comply with the setback requirements contained therein.

¶ 4 Two days later, on July 21, 2005, the trustees of the HOA (the Trustees) held a meeting in which Stuart reported DeCarlo's intent to proceed with construction on Rich's home despite the apparent violation of the Declaration's setback provision. At the meeting, the Trustees determined that Rich's plans would violate the Declaration's setback provision and that a variance to or waiver of those requirements would not be granted. That same day, James Kenny, the president of the HOA, called Rich and left a voice message informing him of this determination and indicating that legal action would be taken if Rich did not halt the contemplated construction. Also that same day, Kenny called DeCarlo and informed him of the Trustees' determination regarding the setback. DeCarlo responded that he and Rich would not comply with the Declaration's ten-foot setback requirement because Park City required only a five-foot setback.

¶ 5 Subsequently, excavation began for the addition to Rich's home. Kenny again called Rich and advised him to cease construction because of the setback violations. Rich responded that he intended to proceed with construction.

¶ 6 On August 29, 2005, Kenny received a letter from DeCarlo requesting that the HOA undergo arbitration to resolve its dispute with Rich regarding the setback requirements. The next day, the HOA sent a letter to DeCarlo advising him that arbitration had been waived due to the untimely demand. [fn1] The HOA filed a complaint in district court, bringing claims for injunctive relief, declaratory relief, and breach of contract. The HOA also requested a temporary restraining order (the TRO).

¶ 7 On the day of the TRO hearing, Rich filed a motion to quash the summons and a motion to dismiss. In his motion to quash, Rich argued that service of process had been improper. In his motion to dismiss, Rich argued that the Declaration required that all disputes between the HOA and its members be resolved through arbitration. At the hearing, the HOA responded that Rich had waived his right to arbitration. To allow time for the HOA to file a written response, the court reserved ruling on Rich's motions. The court nonetheless granted the requested TRO and ordered the parties to submit to Page 995 arbitration. The court noted the arguments about Rich's waiver of the right to arbitration but decided that arbitration would be a practical and efficacious means to resolve the dispute. The TRO ordered Rich and his agents to refrain from construction in any manner that impinged on the ten-foot setback provision of the Declaration. The court did not require the HOA to post a bond in connection with the TRO.

¶ 8 While the parties prepared for arbitration, Rich proceeded with construction on the addition to his home. Rich's attorney signed the acknowledgment and confirmation provision at the end of the arbitrator's engagement letter (the Acknowledgment) but only "upon condition that this does not waive any right of [his] client: who objects to jurisdiction and sufficiency of service of process." Rich's counsel explained his conditions by writing, "There are pending motions to dismiss before the [c]ourt which are under advisement. My appearance does not subject my client to the [c]ourt's jurisdiction."

¶ 9 In response to Rich's actions following entry of the TRO, the HOA requested an order to show cause

and moved that the scheduled arbitration be canceled until Rich removed the condition imposed by his attorney and his objections to jurisdiction. The district court signed the order to show cause and ordered the arbitration canceled "until further notice." Notwithstanding the district court's order canceling the arbitration, Rich and the arbitration panel proceeded with the arbitration hearing without the HOA's attendance or participation. The arbitration panel determined that it had jurisdiction to consider the claims arising under the case pending in the district court because Rich had not objected to the jurisdiction of the arbitration panel — just that of the court — and because the HOA and Rich had signed the Acknowledgment at the end of the engagement letter sent by the arbitrators.[fn2] The arbitration panel reasoned that "although the arbitration was initially ordered by the [c]ourt, it ceased to be [c]ourt-ordered when the parties executed the [Acknowledgment]." Following the arbitration hearing, the arbitration panel ruled that Rich was entitled to a variance of the setback provision in the Declaration and issued an "Interim Award" in his favor. Rich filed in the district court a renewed motion to dismiss, citing the arbitration panel's resolution of the underlying dispute regarding the setback violations.

¶ 10 Subsequently, the district court denied Rich's motion to dismiss and vacated the arbitration award. The district court first noted that section 8.3 of the Declaration "clearly states . . . that any party . . . desiring to arbitrate any controversy shall file written notice of that desire with the [HOA] . . . within 30 days of when he discovers or learns or has notice of such determination or action or decision of [the HOA]." The district court found that Rich "knew of the decision of

the [HOA] Trustees [on] July 21, 2005," but his demand for arbitration — in the form of a letter from his architect, DeCarlo — was made "at the earliest [on]. August 26, but probably [on] August 29, 2005."[fn3] The court determined that Rich "clearly knew more than 30 days before August 29, or August 26, 2005, that the [HOA] would not grant a variance or a waiver" with respect to his violation of the Declaration's setback provision. Thus, the district court held that "[Rich's] demand [for arbitration] was not timely and arbitration was waived under the Declaration."

¶ 11 In connection with its ruling on the motion to dismiss, the district court also concluded that the Acknowledgment signed by both the HOA and Rich did not constitute a Page 996 separate agreement to arbitrate their dispute. The district court found that "arbitration was done because the court ordered it even though it is now clear it had been waived and was not properly demanded." Further, the court determined that "the `agreement' to arbitrate [wa]s void because it [wa]s ambiguous and d[id] not amount to a meeting of the minds" in light of Rich's insertion of additional conditions. The court specifically found that the HOA had "signed the agreement ONLY BECAUSE the court ordered them to as part of the TRO process." The district court then vacated the arbitration panel's interim award because "the arbitration was not based on a valid agreement to arbitrate because that desire for arbitration had been waived by the untimely request for such arbitration."

¶ 12 After a subsequent evidentiary hearing, the district court considered Rich's motion to quash the summons, in which Rich asserted that despite the

private process server's affidavit to the contrary, Rich had never been personally served and that the summons improperly stated that Rich must respond in twenty days, rather than thirty days. Here, the private process server filed the return of service and a subsequent affidavit certifying that he personally served a summons and complaint at Rich's residence in California on a woman who answered the door and appeared to be a resident. Rich presented evidence — affidavits from himself, his son, and his daughter — in an attempt to rebut the process server's proof of service and affidavit. In reviewing this evidence, the district court found "the facts surrounding the service of process to be as testified to by [the private process server] rather than as testified to by the family of [Rich]." Based on these factual findings, the district court concluded that service of process was proper as it was "served on a person of suitable age and discretion residing at the residence of defendant." The court also held that although the summons should have stated that Rich had thirty days in which to file an answer, that misinformation did not prevent Rich from receiving notice, nor did it cause him any prejudice.[fn4] Based on these rulings, the court denied Rich's motion to quash.

¶ 13 Having resolved the issue of service of process, the district court granted the HOA's motion for a preliminary injunction, required the HOA to post a bond in connection with that injunction, and directed the parties to proceed to trial. Prior to trial, the HOA formally withdrew its claims for breach of contract and declaratory relief, but it continued to pursue its claim for injunctive relief and its request for attorney fees associated therewith. The district court examined the nature of the HOA's remaining claim for injunctive

relief and Rich's defense — the HOA's abandonment of the setback requirements — and concluded that both were "purely equitable." The district court then determined that a jury was not required to hear these equitable claims. Furthermore, the district court concluded that Rich's claim of abandonment of the setback provision needed to be resolved before the other issues raised by Rich in his counterclaim — such as delay damages — could, or even needed to, be addressed.

¶ 14 Following the bench trial, the district court granted a permanent injunction and issued a memorandum decision indicating that the HOA, as the prevailing party, was entitled to attorney fees under the Declaration. The HOA submitted an affidavit for fees and costs, which showed attorney fees amounting to $145,489.00 and costs amounting to $16,170.66. Along with the affidavit, the HOA included billing records of the HOA's law firm showing the breakdown of the attorney fees. Later on, the HOA filed a supplement that included a breakdown of the costs.

¶ 15 Rich challenged the district court's award of attorney fees on two grounds. First, Rich argued that the Declaration limited liability for attorney fees to instances where the HOA members pursued claims in bad faith or with actual malice. Second, Rich contended that the affidavit submitted by the HOA's counsel was deficient under rule 73 of Page 997 the Utah Rules of Civil Procedure and that the amount of fees was unreasonable.

¶ 16 The district court rejected Rich's reading of the Declaration and determined that the affidavit submitted by the HOA was generally sufficient. The

district court specifically found that the rates charged by the HOA's attorneys were reasonable; however, it awarded less than the amount requested because certain individual entries of fees either lacked information regarding the work that was completed, appeared to be duplicative of another attorney's work, or appeared to be excessive for the work described as having been performed. The court then reduced the fees associated "with those entries by specific amounts, for a total reduction of $25,950.00.

¶ 17 Rich now appeals virtually every ruling and order of the district court associated with this dispute.

ISSUES AND STANDARDS OF REVIEW

¶ 18 Rich raises five major issues on appeal. First, Rich claims that the district court abused its discretion in finding that he waived his right to arbitration under the Declaration. "Whether a party has effectuated a waiver is a mixed question of law and fact." United Park City Mines Co. v. Stichting Mayflower Mountain Fonds, 2006 UT 35, ¶ 21, 140 P.3d 1200. "'[W]hether the trial court employed the proper standard of waiver presents a legal question which is reviewed for correctness, but the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations.'" Id. (alteration in original) (quoting Pledger v. Gillespie, 1999 UT 54, ¶ 16, 982 P.2d 572). Thus, "we 'grant broadened discretion to the trial court's findings' when reviewing questions of waiver." Id. (quoting Chen v. Stewart, 2004 UT 82, ¶ 23, 100 P.3d 1177).

¶ 19 In connection with this first issue, Rich also

claims that the district court erred in vacating the arbitration award because the HOA entered into a separate agreement to arbitrate the dispute when it signed the Acknowledgment. "In reviewing the order of a trial court confirming, vacating or modifying an arbitration award, we grant no deference to the district court's conclusions [of law] but review them for correctness, and we review the district court's factual findings under a clearly erroneous standard." Cade v. Zions First Nat'l Bank, 956 P.2d 1073, 1076 (Utah Ct.App. 1998) (alteration in original) (internal quotation marks omitted). "Whether or not [an][a]greement constitutes an arbitration agreement is a question of law which we review for correctness, according no particular deference to the conclusions reached by the trial court." Reed v. Davis County Sch. Dist, 892 P.2d 1063, 1064 (Utah Ct.App. 1995). Furthermore, "[w]hether a party waives his or her right to challenge an arbitration award by submitting to arbitration after being ordered to do so [by the court] is a legal question which we review for correctness." Cade, 956 P.2d at 1076.

¶ 20 Second, Rich claims that the district court clearly erred in finding that service of process was proper and in asserting jurisdiction over him. "Whether service of process is proper presents a question of law that we review for correctness." Stichting Mayflower Mountain Fonds v. Jordanelle Special Serv. Dist., 2001 UT App 257, ¶ 7, 47 P.3d 86. However, whether papers were served presents a question of fact, and "[w]e will overturn the trial court's findings of fact only if they are `against the clear weight of the evidence or if [we] otherwise reach[ ]? a definite and firm conviction that a mistake has been made.'" Cooke v. Cooke, 2001 UT App 110, ¶ 7, 22

P.3d 1249 (second and third alterations in original) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

¶ 21 Third, Rich asserts that the district court erred in concluding that the case did not need to be tried to a jury. Whether there is a right to a jury trial is a question of law that we review for correctness. Cf. Goldberg v. Jay Timmons & Assocs., 896 P.2d 1241, 1242 (Utah Ct.App. 1995) ("[W]hether the trial court erred in designating the jury's verdict as advisory. . . . is a question of law, hinging on an interpretation of Utah Rule of Civil Procedure 39(c); thus, we review the trial court's procedural choice for correctness."). However, "'[i]t is the Page 998 prerogative of the judge who actually tries the case to make the determination'" of whether an issue is "'one in equity or one in law wherein the party can insist on a jury as a matter of right.'" Corbet v. Cox, 30 Utah 2d 361, 517 P.2d 1318, 1320 (1974) (quoting Sweeney v. Happy Valley, 18 Utah 2d 113, 417 P.2d 126, 128-29 (1966)). Thus, "'[unless it is shown that the ruling [determining the equitable or legal nature of the issue] was patently in error or an abuse of discretion, this court will not interfere with the ruling thereon.'" Id. (quoting Sweeney, 417 P.2d at 129).

¶ 22 Fourth, Rich contends that the district court abused its discretion in failing to require the HQA to post a bond at the time the TRO was issued. We review a district court's decision regarding the necessity of posting a bond for a temporary restraining order for abuse of discretion. See Corporation of the President of the Church of Jesus Christ of Latter-Day Saints v. Wallace, 573 P.2d 1285, 1287 (Utah 1978) ("[T]he trial judge has wide discretion in the matter of

requiring security [for a temporary restraining order]. . . .").

¶ 23 Fifth, Rich claims that the district court erred in concluding that the Declaration did not limit Rich's liability for attorney fees and that, even if he was liable for attorney fees, the HOA's affidavit of fees was insufficient and the district court abused its discretion when calculating reasonable attorney fees in this case. "Whether attorney fees are recoverable in an action is a question of law, which we review for correctness." Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998). However, "Calculation of reasonable attorney fees is in the sound discretion of the trial court . . . and will not be overturned in the absence of a showing of a clear abuse of discretion." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988); accord Valcarce, 961 P.2d at 316.

ANALYSIS

I. Right to Arbitration

A. Waiver

¶ 24 Rich claims that the district court erred in concluding that he waived his right to request arbitration of his dispute with the HOA by failing to demand arbitration within the thirty-day time period mandated by the Declaration. Where a party is contractually bound to follow certain procedures and timelines in order to invoke specified contractual rights, and the party fails to do so, the party waives his or her rights. See Brinton v. IHC Hosps., Inc., 973 P.2d 956, 966 (Utah 1998) ("[T]he trial court correctly required [the party] to timely assert each objection to

purported . . . violations of the [contract], in compliance with his contractually assumed duty, or relinquish them [as waived]."); see also DCM Inv. Corp. v. Pinecrest Inv. Co., 2001' UT 91, ¶ 9, 34 P.3d 785 ("[Defendants failure to choose either option [as required by the contract] resulted in waiver of its contractual right to select an option."); American Rural Cellular v. Systems Commc'n Corp., 939 P.2d 185, 193 (Utah Ct.App. 1997) (noting that an arbitration provision in a contract did not apply "because both parties failed to comply with the 'binding arbitration' requirement of the contract. . . . [and][therefore the parties [we]re deemed to have waived this provision").

¶ 25 Here, the district court held that the contract between Rich and the HOA required Rich to make a demand for arbitration within thirty days of receiving notice of the HOA's determination both that his proposed addition would violate the HOA's set-back requirements and that he would not be granted a variance or waiver of those requirements. The district court then found that Rich had notice of the HOA's determination not to grant him a variance or waiver of the setback provision on July 21, 2005, and that Rich made his demand for arbitration on August 26, 2005, at the earliest, which was thirty-six days after he received notice. Rich does hot dispute the Declaration's thirty-day requirement for demanding arbitration. Rather, he claims that the district court erred in finding he had notice on July 21, 2005, because the HOA informed him of its determination through a phone message that he claims he did not receive until he returned home from vacation at a later date. Page 999

¶ 26 Although Rich points to his own testimony

regarding his notice, he overlooks the fact that the district court also found that Rich's architect and son-in-law, DeCarlo, learned of the HOA's determination on July 21, 2005, and had been provided a copy of the Declaration the day before. It is well established that

> a principal is affected with constructive knowledge, regardless of his actual knowledge, of fail material facts of which his agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, although the agent does not in fact inform his principal thereof.

3 C.J.S. Agency § 432 (1973), quoted with approval in Wardley Better Homes & Gardens v. Cannon, 2002 UT 99, ¶ 16, 61 P.3d 1009. Rich does not challenge the district court's findings with regard to his architect's notice and knowledge. For this reason, we conclude that the district court did not clearly err in finding that Rich had notice on July 21, 2005, of the HOA's determination and that he made his demand for arbitration after the Declaration's thirty-day deadline.

B. The Acknowledgment

¶ 27 Rich also claims that, regardless of the Declaration, he and the HOA entered into a second agreement to arbitrate their dispute when they signed the Acknowledgment following the court's order of arbitration. He contends that the arbitration ceased to be court-ordered the moment the parties signed the Acknowledgment, that the HOA therefore lost its ability to challenge the arbitration award on the basis that no arbitration agreement existed, and that the district court erred in vacating the award on that basis.

A "district court may vacate [an arbitration] award if `there was no agreement to arbitrate,' as long as the party objected before participating in the arbitration proceeding." Powell v. Cannon, 2008 UT 19, ¶ 19, 179 P.3d 799 (quoting Utah Code Ann. § 78-31a-124(1)(e) (2002)). This is because "[arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Cade v. Zions First Nat'l Bank, 956 P.2d 1073, 1076-77 (Utah Ct.App. 1998) (citation and internal quotation marks omitted). As a result, "[w]e must first conclude that arbitration is a remedy which has been bargained for by the parties." Id. at 1077 (internal quotation marks omitted). Additionally, the court — and not the arbitration panel — is to "decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." Utah Code Ann. § 78-31a-107(2) (2002).

¶ 28 In determining whether an agreement to arbitrate exists, it must be remembered that "policies supporting liberal enforcement of arbitration agreements inhere only once the arbitration agreement is established." Jenkins v. Percival, 962 P.2d 796, 800 (Utah 1998). Thus, "[o]nly when such [an] agreement on arbitration exists may we encourage arbitration by liberal interpretation of the arbitration provisions themselves." Cade, 956 P.2d at 1077. In other words, the presumption in favor of arbitration does not create a presumption in favor of finding that an agreement to arbitrate actually exists. See id. at 1077 ("[A]l-though there is a presumption in favor of arbitration, a party will not be required to arbitrate when it has not agreed to do so." (citations and internal quotation marks omitted)).

¶ 29 Here, the Acknowledgment was signed because of a court order mandating arbitration, much as in Cade v. Zions First National Bank, 956 P.2d 1073 (Utah Ct.App. 1998). In Cade, a bank employee brought suit against the bank following his termination. See id. at 1075. The bank filed a motion to compel arbitration, arguing that a particular document signed by the employee constituted an agreement to arbitrate any such dispute. See Id. The trial court granted the bank's motion and the employee subsequently executed a "Uniform Submission Agreement for NASD Arbitration." Id. Following the arbitration proceeding, the employee challenged the arbitration award and renewed his argument that no arbitration agreement existed between himself and the bank. See Id., at 1076. The bank argued that the employee had waived his right to challenge the arbitration award and the existence of an arbitration agreement by, among Page 1000 other things, executing the Uniform Submission Agreement for NASD Arbitration. See id. at 1080. This court ruled against the bank. See id. at 1081.

¶ 30 In reaching its decision in Cade, this court noted that "[t]his [wa]s not a case where a party voluntarily enters into arbitration and then, only after losing, challenges the award in an attempt to roll the dice in" a court proceeding." Id. at 1080 n. 3. Rather, this court observed that the party was "forced. . . . into arbitration" by virtue of the opposing party's motion to compel arbitration and the trial court's order granting that motion. Id.' Thus, this court held "that [the employee] did not waive his right to challenge the arbitration award by merely following the district court's order to submit to arbitration." Id. at 1080.

¶ 31 The Acknowledgment that Rich claims constitutes a separate and distinct agreement to arbitrate was nothing more than an arbitration engagement letter, akin to the submission agreement in Cade. The letter set forth the persons serving on the arbitration panel, the fees charged by each arbitrator, the rules that would 'govern the arbitration proceeding, the date and length of the arbitration hearing, and the date of a prehearing conference. Although the arbitrator who sent the letter requested that "counsel for the parties . . . confirm and acknowledge by signing this letter that they have agreed to arbitrate all issues arising under [the case] pending in the [district court]," the district court specifically found that the HOA's counsel had signed that letter "ONLY BECAUSE" the HOA was forced into arbitration by virtue of the court's order, not because the HOA had any intent to enter into a separate arbitration agreement. In addition, the district court found that the unilateral imposition of additional conditions in the Acknowledgment by Rich's counsel precluded any sort of meeting of the minds with respect to the purpose of the Acknowledgment and thereby precluded the actual formation of an agreement.

¶ 32 We conclude that the Acknowledgment did not constitute a separate and distinct agreement to arbitrate the dispute between Rich and the HOA. Given Rich's waiver of arbitration under the Declaration and the lack of a separate agreement to arbitrate, the district court did not err by vacating the arbitration award on the ground that there was no agreement to arbitrate.

II. Jurisdiction, Service of Process, and Summons

¶ 33 Rich claims that the district court lacked jurisdiction over him because he was never personally served, despite the private process server's "Proof of Service" and affidavit to the contrary. A private process server's "return of service certifying that [a defendant] was personally served is presumptively correct and can be disproved only by clear and convincing evidence." Cooke v. Cooke, 2001 UT App 110, ¶ 9, 22 P.3d 1249; see also Classic Cabinets, Inc. v. All Am. Life Ins. Co., 1999 UT App 88, ¶ 13, 978 P.2d 465 ("Because . . . we presume the correctness of the constable's Affidavit of Service, the burden then shifts to [the defendant] to prove, by clear and convincing evidence, that service was improper."). Here, the private process server filed the return of service and a subsequent affidavit certifying that he personally served a summons and complaint at Rich's residence in California on a woman who answered the door and appeared to be a resident. Rich presented affidavits from himself, his son, and his daughter. However, these self-serving affidavits do not amount to clear and convincing evidence sufficient to disprove the presumption in favor of the process server's return of service.

¶ 34 Rich also claims that the summons he received was fatally defective because it allowed him only twenty days to respond, instead of the thirty days that should be afforded to a nonresident. In Meyers v. Interwest Corp., 632 P.2d 879 (Utah 1981), the Utah Supreme Court considered whether a Utah court lacked jurisdiction over a nonresident defendant where the summons issued to the defendant "stated that the defendant had twenty days within which to file an answer." Id. at 880. The supreme court ruled that "[although the summons may have been defective, the defect was inconsequential." Id. at 881. The supreme

court noted that "the defendant was Page 1001 properly served with a summons and was put on notice that it was being sued and would have to take action to defend itself." Id. at 880-81. Furthermore, there was no showing that the defendant was prejudiced by the summons's statement because there was "no showing that defendant relied to its detriment on the twenty-day period stated in the summons; nor [did] it seem possible that the defendant could have been harmed by reliance on that statement." Id. at 881. The supreme court concluded that the defect in the summons did not "interdict[ ]? the exercise of all power by the court to act in [the] matter" but, rather, the court retained "jurisdiction to permit an amendment of the summons," Id., and such amendment "relates back to the initial summons," Id.

¶ 35 In this case, Rich has not shown how the mistake precluded actual notice of the HOA's action against him or otherwise prejudiced him. When ruling on Rich's motion to quash the summons, the district court stated that it would give Rich a full thirty days to answer the complaint. The HOA subsequently served Rich with another summons that properly stated the time frame for his response. We therefore conclude that the district court did not err in concluding that the defect in the summons was inconsequential and that it did not deprive the court of jurisdiction.

¶ 36 Finally, Rich makes a general claim that there was no basis for asserting personal jurisdiction over him or that it was erroneous for the district court to enter a TRO without first affirmatively deciding whether it had jurisdiction over him. Rich does not cite any cases regarding personal jurisdiction, nor does he conduct any analysis with respect to Utah's long-arm

statute or his minimum contacts with the state. "It is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief." Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998). Even if Rich had adequately briefed this particular issue, the success of his argument is doubtful given that Rich owned property in Utah and the action arose directly from his use of it. See Rhoades v. Wright, 622 P.2d 343, 346 (Utah 1980) ("We consider the presence of defendants' land — decidedly tangible and immovable — together with the use of the land to be sufficient contacts by defendants with this State to support the exercise of jurisdiction."). Documents submitted along with the HOA's request for a TRO showed that Rich had availed himself of Utah's laws and was pursuing additional use of his Utah property by submitting building applications and receiving building permits. Thus, the district court properly assumed it had jurisdiction to issue the TRO based on a prima facie showing of jurisdiction made by the HOA through documentary evidence attached to the HOA's TRO request. See Ne-ways, Inc. v. McCausland, 950 P.2d 420, 422 (Utah 1997) (stating that a court "may determine jurisdiction. . . . on documentary evidence alone . . ., [and] the plaintiff is only required to make a prima facie showing of personal jurisdiction" at that point (internal quotation marks omitted)).

III. Right to a Jury Trial

¶ 37 Rich claims that the district court erred by striking the jury and proceeding with a bench trial on the HOA's claim for injunctive relief and Rich's defense of abandonment. The "constitutional right to a jury trial in civil cases extends only to cases that would have been cognizable at law at the time the

constitution was adopted." Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc., 795 P.2d 658, 661 (Utah 1990); see also Utah R. Civ. P. 39(a)(2) ("The trial of all issues so demanded shall be by jury, unless . . . [t]he court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist."). A trial court has discretion to determine whether an issue is one in equity or one in law. See Corbet v. Cox, 30 Utah 2d 361, 517 P.2d 1318, 1320 (1974) ("In circumstances where doubt exists as to whether the cause should be regarded as one in equity, or one in law wherein the party can insist on a jury as a matter of right, the trial court should have some latitude of discretion." (internal quotation marks omitted)). Once an issue is determined to be equitable as opposed to legal, "the equitable issue raised should first be disposed of as in a court of equity, and then if an issue at law remains, it is triable to Page 1002 a jury." Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 242, 43 S.Ct. 118, 67 L.Ed. 232 (1922). Only where "legal and equitable issues turn on the same operative facts, [must] a jury . . . decide the legal issue first." Zions First Nat'l Bank, 795 P.2d at 661.

¶ 38 The district court did not abuse its discretion in determining that the HOA's claim for injunctive relief was an equitable claim that could be heard without a jury. See Goldberg v. Jay Timmons & Assocs., 896 P.2d 1241, 1242 (Utah Ct.App. 1995) ("A request for injunctive relief for violation of [a subdivision's Declaration of Covenants, Conditions, and Restriction's] is brought in equity."). Rich's legal issues — such as delay damages — did not turn on the same operative facts as the claims for injunctive relief and abandonment. The district court therefore did not err in determining that the equitable issue of

injunctive relief and the equitable defense of abandonment should be heard first without a jury. Because the HOA's success on its request for injunctive relief rendered Rich's legal claims moot, the district court properly dispensed with a jury trial on those claims.

IV. Requirement of a Bond

¶ 39 Rich claims that the district. court abused its discretion by not requiring a bond prior to issuing the TRO. Rule 65A of the Utah Rules of Civil Procedure states that "[t]he court shall condition issuance of the [TRO] . . . on the giving of security by the applicant . . . unless it appears that none of the parties will incur or suffer costs, attorney fees or damage as the result of any wrongful order." Utah R. Civ. P. 65A(c)(1). "[I]f there is an absence of proof showing a likelihood of harm, certainly no bond is necessary." Corporation of the President of the Church of Jesus Christ of Latter-Day Saints v. Wallace, 573 P.2d 1285, 1287 (Utah 1978).

¶ 40 Here, the district court found that there was not a likelihood of harm in the event of a wrongfully issued TRO because when it was issued, construction on the home was at the very beginning phase and the court was essentially dealing with "a hole in the ground." The court ordered expedited arbitration to reduce the time that the TRO would be in place. Furthermore, once a preliminary injunction was issued, the court required a bond and the HOA posted the same. The court, therefore, acted within its discretion by not requiring a bond on the TRO.

V. Attorney Fees

¶ 41 Rich claims that the district court erred by awarding attorney fees to the HOA because the Declaration limits his liability for the HOA's attorney fees to circumstances where Rich acted in bad faith or with malice. He also asserts that the district court erred by awarding attorney fees to the HOA because the HOA's affidavit of fees and costs failed to comply with rule 73 of the Utah Rules of Civil Procedure and that the district court abused its discretion in calculating the reasonable amount of fees.

A. Contractual Basis for Attorney Fees

¶ 42 "In general, attorney fees may be awarded to the prevailing party only if allowed by statute or contract." American Rural Cellular v. Systems Commc'n Corp., 939 P.2d 185, 192 (Utah Ct.App. 1997). "If provided for by contract, attorney fees are awarded in accordance with the terms of that contract." Id. (internal quotation marks omitted). "When interpreting a contract, `we look to the writing itself to ascertain the parties' intentions, and we consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none.'" Green River Canal Co. v. Thayn, 2003 UT 50, ¶ 17, 84 P.3d 1134 (omission in original) (quoting WebBank v. American Gen. Annuity Serv. Corp., 2002 UT 88, ¶ 18, 54 P.3d 1139). "'If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language. . . .'" Id. (quoting Web-Bank, 2002 UT 88, ¶ 19, 54 P.3d 1139).

¶ 43 The contract at issue in this case, the Declaration, contains an attorney fees provision in

section 7, which is entitled "Enforcement." Section 7.1 allows the HOA or "an owner of a Lot" to bring an enforcement Page 1003 action, and it provides that the prevailing party in that enforcement action is "entitled to recover its costs and expenses in connection therewith, including reasonable attorney fees." Section 7.3 of the Declaration, however, provides for a limitation on liability:

> Neither Declarant, the Association, the Board of Trustees of the Association, the Architectural Committee nor any member, agent or employee of any of the same shall be liable to any party for any action or for failure to act with respect to any matter if the action taken or failure to act was in good faith and without malice.

¶ 44 Rich claims that because he is a member of the HOA, he is covered by this limited liability provision and cannot be required to pay the HOA's attorney fees because his actions were conducted in good faith. The HOA asserts that the "member" referenced in section 7.3 is a member of the Architectural Committee and not a general member of the HOA. Thus, the HOA asserts that section 7.3 does not limit the liability of members of the HOA.

¶ 45 We agree with the HOA and the district court that Rich's interpretation of the contract fails. When the language of the Declaration is read as a whole, the language of section 7.3 does not limit the liability of members of the HOA who defend a successful enforcement action brought by the HOA. Nothing in the language of section 7.1 indicates that it is limited or modified by other provisions within the Declaration, including Section 7.3. To the extent

section 7.3 could be viewed as bearing on attorney fees, [fn5] its reference to "any member, agent, or employee" is consistent with the Declaration's use of that phrase to refer to members of the Architectural Committee, but it is not consistent with its. reference to individual members of the HOA — who otherwise are consistently referred to as "Members of the Association," "Members," or, as in section 7.1, "owner[s]." Thus, the district court did not err in concluding that the HOA was entitled to attorney fees under the Declaration and that Rich's liability for such was not limited.

B. Calculation of Reasonable Attorney Fees and Costs

¶ 46 Rule 73 of the Utah Rules of Civil Procedure requires that a request for attorney fees "be supported by affidavit." Utah R. Civ. P. 73(a). This rule also requires the affidavit to set forth "the basis for the award; a reasonably detailed description of the time spent and work performed, including for each item of work the name, position . . . and hourly rate of the persons who performed the work; . . . [and] factors showing the reasonableness of the fees." Utah R. Civ. P. 73(b)(1)-(3). "The reasonableness of an award of attorney fees is highly individualized and decided 'according to the factually varied context of each particular case.'" Amyx v. Columbia House Holdings, Inc., 2005 UT App 118, ¶ 6, 110 P.3d 176 (quoting Foote v. Clark, 962 P.2d 52, 56-57 (Utah 1998)).

¶ 47 The district court properly found that the affidavit submitted by the HOA's counsel satisfied the requirements of rule 73 of the Utah Rules of Civil Procedure. While only one attorney from the firm submitted an affidavit, the affiant stated that he was operating from personal knowledge and he included

the firm's billing records with his affidavit. The entries in the billing records stated the work performed, the person performing the work, and the hourly rate charged by the person performing the work. While the billing records did not state the amount of time expended by each person on a given entry, those figures are easily calculated by dividing the total fee by the hourly rate charged.

¶ 48 In considering the reasonableness of the amount of fees, the court explicitly considered the factors established in Dixie State Bank v. Bracken, 764 P.2d 985, 989-90 (Utah 1988) (outlining several factors that trial courts should consider in awarding attorney fees). The district court found that the billing rates charged were reasonable for the Page 1004 local area. The district court also found the fees to be reasonable because Rich was "responsible for the bulk of [the] litigation." Where the court found the reported time expended for a particular task to be unreasonable — either because the total amount of the fee was excessive, redundant, or inadequately explained — the court made a specific reduction in the amount charged for that specific task. Thus, the court did not abuse its discretion in determining the reasonableness of the fees requested. VI. Attorney Fees on Appeal

¶ 49 The HOA requests its attorney fees on appeal. "[W]hen a party who received attorney fees below prevails on appeal, 'the party is also entitled to fees reasonably incurred on appeal.'" Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998) (quoting Utah Dep't of Soc. Servs. v. Adams, 806 P.2d 1193, 1197 (Utah Ct.App. 1991)). We therefore grant the HOA its attorney fees reasonably incurred on appeal.

CONCLUSION

¶ 50 We conclude that the district court did not abuse its discretion in determining that Rich's untimely demand for arbitration constituted a waiver of his right to arbitrate his dispute with the HOA. Given that the Acknowledgment did not constitute a separate agreement to arbitrate, the district court did not err in vacating the arbitration award. The district court properly asserted jurisdiction over Rich and did not clearly err in determining that service of process had been effected on Rich or that the defect in the summons was inconsequential. Because the remaining claim at the time of trial was equitable, the district court properly proceeded with a bench trial. The court did not err by not requiring the HOA to post a bond at the time the TRO was issued against Rich because there was no showing of harm. In light of the plain language of the Declaration, the district court did not err in concluding that the HOA, as the prevailing party, was entitled to attorney fees and that Rich was not entitled to a limitation of liability for such. Finally, the affidavit submitted by the HOA for attorney fees was sufficient and the district court did not abuse its discretion in calculating reasonable attorney fees in this case.

¶ 51 We therefore affirm. The case is remanded to the district court for an award to the HOA of attorney fees it has reasonably incurred on appeal.

¶ 52 WE CONCUR: PAMELA T. GREENWOOD, Presiding Judge, and GREGORY K. ORME, Judge.

[fn1] The Declaration provided: "Any party desiring to arbitrate any controversy shall file written notice of his

desire with the [HOA] . . . within 30 days after he discovers, learns or has notice of such determination, decision or action . . . taken under or pursuant to any provision of . . . this Declaration."

[fn2] The Acknowledgment stated, "Counsel for the parties acknowledge and agree that the above referenced matter may be arbitrated in accordance with the Utah Revised Uniform Arbitration Act and accept the arbitration panel as on the terms and as provided for in this letter."

[fn3] Rich's demand letter was dated August 26, 2005, but it was not received by Kenny until August 29, 2005. The district court also concluded that Rich's hand-delivered letter did not comply with the requirements of the Utah Arbitration Act and stated, "Even if the demand for arbitration was timely, notice under Utah law of a desire to participate in arbitration must be in conformity with Utah law, [Utah Code section] 78-31a-110, or in other words, must be by certified or registered mail, and the nature of the dispute must be set forth."

[fn4] Prior to its definitive ruling on this issue, the district court stated that it would allow thirty days for filing an answer if the case was not resolved through Rich's motion to dismiss.

[fn5] We do not comment on whether, if Rich were entitled to recover attorney fees as the prevailing party below, the reciprocity mandate of Utah Code section 78-27-56.5 would allow the HOA to assert Section 7.3 as a bar to his recovery of fees. See Utah Code Ann. § 78-27-56.5 (2002).

3. Memorandum Decision of the Third Judicial District Court dated March 16, 2007 (Lubeck).

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JAMES J. KENNY, PATRICIA D. KENNY, JAMES E. B. STUART, EILEEN A. STUART, ROBERT C. SLETTOM, FAY SLETTOM, RICHARD L. MEASELLE, CHASE PETERSON, GRETHE B. PETERSON,
PLAINTIFFS.
V.
JOHN L. RICH,
DEFENDANT
CASE NO. 05050428
JUDGE BRUCE LUBECK
MEMORANDUM DECISION
DATED MARCH 16, 2007

The above matter came before the court for a bench trial on March 12 and 14, 2007 in a bifurcated proceeding. Plaintiffs were present with and through Joseph E. Tesch and Jason S. Wilcox and defendant was present with Denver C. Snuffer and Bret Reich. On March 5, 2007, the court issued a Ruling and Order which set forth the issues to be tried in this proceeding as set forth below.

BACKGROUND

Plaintiffs, various individuals who are members of a homeowners association, Thaynes Canyon I Homeowners Association (HOA), along with the HOA, filed a complaint on August 19, 2005. It was brought in

the name of the above plaintiffs as well as the Thaynes Canyon I Homeowners Association, an unincorporated association. It alleged the HOA was created in 1971 and there was

-1-

a Declaration of Restrictive Covenants (Declaration) extant since that time. The Declaration contained, at section 6.4, a 10 foot setback provision for all buildings and structures. Defendant obtained a building permit from Park City in the Summer of 2005 which allowed an expansion of his home in the subdivision with a setback of only 6.8 feet. The complaint alleged defendant was notified of the provision but determined to go ahead with construction anyway. The complaint sought injunctive relief, declaratory relief that the setback provision was viable and enforceable, and damages for breach of contract, the contract being the Declaration. A jury demand was filed with the complaint.

On the same date plaintiffs sought a temporary restraining order. The court scheduled a hearing to consider whether to issue the TRO for August 29, 2005, but that was moved to September 16, 2005, On September 16, 2005, defendant filed a motion to quash the summons, alleging improper service and a lack of jurisdiction over defendant. Defendant also filed a motion to dismiss alleging arbitration was required under the Declaration, section 8.3.

The court held the hearing on September 16, 2005, and counsel was present for all parties. The court issued a TRO and required the parties to submit to arbitration within 14 days. The court reserved ruling on defendant's motions to quash and to dismiss.

-2-

Other pleadings were filed dealing with alleged contempt on behalf of defendant for going forward with

the construction work after the TRO was issued and a renewed motion to dismiss was also filed by defendant. After hearing on October 5, 2005, the court issued a ruling on October 6, 2005, and vacated a purported arbitration award and reserved on the motion to quash and the motion an order finding defendant in contempt.

Defendant sought permission to file an interlocutory appeal and sought to stay the proceedings. The court denied the request to stay proceedings on October 14, 2005. A hearing on the request for preliminary injunction was obviously delayed based on these other proceedings, arbitration and stay and contempt issues. Permission to appeal was denied by the Utah Court of Appeals on October 27, 2005.

Defendant then filed a motion to disqualify the undersigned judge. That was referred on October 19, 2005, to the associate presiding judge, who on October 25, 2005, denied the motion.

The court then scheduled and conducted an evidentiary hearing on November 3, 2005, concerning the request for preliminary injunction as well as the motion to quash. The hearing had been previously set for October 21, 2005, but the intervening motions caused the delay. The court issued findings of fact concerning the motion to quash and the preliminary injunction, and denied the motion to quash and granted a

-3-

preliminary injunction, requiring plaintiffs to post a bond in the sum of $20,000. A cash bond was filed November 16, 2005. That was later changed to a surety bond on February 3, 2006.

On December 30, 2005, defendant filed an answer, counterclaim and third party complaint. It

denied the essential allegations and asserted affirmative defenses including improper service, that the HOA was not duly elected, abandonment of the setback provision, and improper variance denial. As a counterclaim defendant alleged that others in the subdivision had violated the setback provision and some eleven other properties were listed. It alleged an improper denial of a variance, improper election of the trustees and architectural committee and abandonment. It sought declaratory judgment that there was an improper election and so there was no authority to act on behalf of the HOA, that plaintiffs obtained a wrongful TRO and delay damages had been suffered by defendant. It also sought a declaratory judgment that the enforcement of the action was discriminatory as other violations had not been enforced. It also sought a declaration that the setback provision had been abandoned and that the other violators are in violation of the Declaration. Defendant sought damages and the above declarations.

Plaintiffs filed a reply to the counterclaim on January 19, 2006, and an amended reply on April 11, 2006. They also moved to

-4-

dismiss the third party complaint. Defendant moved to join all other property owners in the subdivision as indispensable parties. Various motions to strike various pleadings were also filed.

In a ruling of September 21, 2006, the court granted plaintiffs' motion to dismiss the third party complaint, and denied defendant's motion to join all other subdivision home owners as indispensable parties.

On November 6, 2006, the court also denied plaintiffs' motion for leave to file an amended complaint. This trial date was set at that hearing also.

Discovery motions were then filed and resolved.

Plaintiff filed a motion for summary judyment on January 16, 2007. The court ruled on February 20, 2007, and mostly denied that motion but indicated, in a too-hurried decision given the time of the trial, that the Declaration barred a damage recovery from plaintiffs as committee members and the HOA. However, given the current posture of the case as discussed below and in the further background facts, that position is vacated.

On February 23, 2006, other motions were filed and the court ruled on March 5, 2007, that the case would proceed as a bench trial on the sole issue of whether a permanent injunction should issue, coupled with the abandonment defense to that claim. The other issues of damages and liability by plaintiffs to defendant

-5-

were bifurcated and will be considered further as needed.

Thus, the ruling of the court partially granting summary judgment is VACATED. The motion is denied in its entirety. Other issues after this decision will be examined as necessary.

The court heard evidence, received exhibits, heard argument of counsel, and is fully advised. The court took the matter under advisement. At the end of defendant's case plaintiff moved for judgment and that was taken under advisement and plaintiff presented rebuttal evidence.

The court finds as follows:

FINDINGS OF FACT

1. Each of the named individual plaintiff testified they own, alone or with their spouse, a lot (in one instances two lots combined into one lot) within the Thaynes Canyon I Subdivision and each of them desire

to enforce the covenants contained in the Declaration with respect to a violation of the setback provision on Lot 73, owned by defendant.

2. The court is free, under URCP, Rule 65A(a)(2), to consider the evidence received at the preliminary injunction hearing held November 3, 2005, as that evidence would be and is admissible at the trial. Accordingly, the court also finds, as

it did after that hearing, supplemented by evidence at this trial, as follows in paragraphs 2a through 2p:

2a. The Thaynes Canyon I HOA was created in 1971 and a Declaration of Protective Covenants (Declaration) was recorded. (Pl. Exhibit 1) Other individual plaintiffs are members of that HOA. Thaynes Canyon I was one of the first "subdivisions" in Park City. It is an open area, with many lots adjoining a public golf course, and with open spaces and streams and creeks running through it. The lots are mostly irregular throughout the subdivision.

2b. Defendant owns Lot 73 in the Thaynes Canyon Subdivision, at the address of 57 Thaynes Canyon. Plaintiffs Kenny lives across the street and plaintiffs Stuart lives on Lot 74, adjoining defendant basically to the north, and plaintiffs Slettom lives in a residence on Lot 72 adjoining defendant largely to the south. Other plaintiffs own lots nearby. The HOA has an architectural committee and a board of directors, or trustees, of which Kenny was the president. The architectural committee is to approve all improvements, including improvements on houses, garages, and excavating and other aspects of improvement. No improvement to a residence is to be made without approval of the architectural committee. Declaration, Sec. 4.2.

2c. The Declaration states that "all buildings

and structures on all Lots shall be setback at least 10 feet from the

-7-

side and rear lot lines." Sec. 6.4.

2d. There are other restrictions dealing with height, usage, allowable signs, pets, waste and nuisance, and other aspects of maintaining a neighborhood set out in the Declaration. The purpose of the Declaration, as set forth in section 1.1, is to maintain and protect the beauty and view of the area in connection with the uses and structures.

2e. The restrictions and conditions may be enforced by any lot owner or by the HOA or by Park City, by injunctive relief. Sec. 7.1

2f. All parties took their interest in their lots after the Declaration was recorded. From other documents in the file, it appears defendant obtained his interest by warranty deed recorded February 20, 1998, as Trustee of a trust, subject to the restrictions and easements of record. As Trustee defendant then conveyed the property by quit claim deed recorded September 9, 2003, to defendant personally.

2g. Defendant was granted a building permit on August 10, 2005, by Park City Planning Commission to build an addition to the residence on Lot 73. (Def. Exhibit 17). The Park City Municipal Code required only a five foot setback from property lines at that time, though that has now been amended at the request of the HOA to require a 10 foot setback in this subdivision. (Def. Exhibit 115)

-8-

2h. The committee log, kept by Piper (Def. Exhibit 27) shows Piper received the plans from DeCarlo an July 12, 2005. It was noted that the plan called for the building to be 6.8 feet from the lot line. James Stuart was a member of the trustees and on the

architectural committee in 2005. On about July 19, 2005, Michael DeCarlo (DeCarlo), the son-in-law of defendant and the licensed architect for defendant on the proposed addition on Lot 73, presented a set of plans to Stuart for an addition to defendant's residence. Previously DeCarlo and Stuart and a former member of the committee James Piper, who passed away on a date unknown but evidently at the end of July or early August, 2005, had several talks with DeCarlo about the proposed addition. Those included discussions about the ten foot set back provision. The original design by DeCarlo showed the home addition coming straight back and off of the existing home, but upon being notified of the set back provision, DeCarlo changed the plans to twice "step back" the addition to that shown on the plans submitted to the architectural committee. The plans finally submitted to the committee are as shown in P1. Exhibit 3. The plans called for a two story addition to the existing home.

2i. Stuart again noticed that the addition was shown as "6.8," (which is 6 feet 91/2 inches). Stuart advised DeCarlo the plans were not in accord with the set back provision of ten feet. DeCarlo said Park City was willing to issue a permit on the

-9-

drawings and Stuart asked DeCarlo to alter the plans again to conform to the Declaration. DeCarlo said they, defendant and DeCarlo, were going ahead with the construction. DeCarlo explained to Stuart that the infringement on the setback area was minor and not flagrant and attempted to demonstrate how the building could not be seen from the street as the building addition was at the rear of the residence of defendant. Stuart explained that he was just one member of the committee and he could not approve anything by himself. Earlier DeCarlo had spoken with

Piper who evidently from the log, though Piper is now deceased, told him the same thing, that the plans could not be approved. Stuart told DeCarlo that a meeting was going to be held to discuss the submitted plans. DeCarlo did not inquire when and where' the meeting would be. No one ever told DeCarlo when and where the meeting would be held. DeCarlo did not submit a request for a variance in writing or orally to the architectural committee before the meeting was held. Stuart had noted preliminary work in defendant's yard before July 19, 2005, by way of marking and staking and painting of lines and boundaries in the yard.

2j. Stuart advised others of the meeting with DeCarlo, and those others advised Kenny, who was also on the architectural committee. Kenny set a meeting for July 21, 2005. Some members of the committee and some trustees were present. They discussed

-10-

the plans submitted by defendant, though defendant was not present nor was DeCarlo. Defendant had no opportunity to make a presentation at that meeting as he was not present. Stuart gave DeCarlo a copy of the Declaration on July 20, 2005. The committee log shows the meeting was held July 21, 2005.

2k. Neither DeCarlo nor defendant attended the July 21, 2005, meeting, which resulted in a decision to reject the plans as violative of the ten foot set back provision in the Declaration. During or just after the meeting Kenny called defendant and left a voice message that the plans were not approved. Defendant did not receive that message until August as defendant was on vacation. Kenny also called DeCarlo and spoke with him shortly thereafter upon a return call. Kenny told DeCarlo of the decision to reject the plans and Kenny asked DeCarlo to consult with defendant and

change the plans, as the HOA was prepared to attempt to halt the construction under the proposed plans through litigation. DeCarlo reiterated defendant's position that Park City had issued a permit and they, defendant and DeCarlo, were going forward with construction. DeCarlo advised Kenny that they, Kenny and the HOA, were just being difficult. That contact, though not its content, was referenced in the committee log. That is the last entry in that log so evidently Piper passed away shortly thereafter. The court finds that DeCarlo did not in fact have a Park City permit until

August 10, 2005. Application was not made until August 1, 2006 according to Def. Exhibit 17. Perhaps Park City had orally indicated they would grant a permit, but to the extent DeCarlo stated he had a permit in July 2005 that was not accurate. As noted, the permit was actually issued August 10, 2005.

21. Defendant continued with the planned addition and work began. On August 12, 2005, Stuart and Kenny observed piles of dirt and measured, by use of a pole and tape measure, and found the footings were approximately 6.5 feet from the property line shared by defendant and Stuart, between Lots 73 and 74, just as the rejected plans showed. The fence line between Lot 73 and Lot 72 was not in fact on the property line. The fence line and property line were in fact congruent at the back of the two properties, but Lot 73 is narrower in the front than in the back of the property. The fence line in the front of the properties was in fact about 2 feet onto the Stuart property, or two feet north of the actual property line. Further notice was given by plaintiffs to defendant on August 14, 2005 to discontinue work. Kenny called defendant in California and indicated he wanted to avoid

litigation and asked defendant to comply with the Declaration. Defendant stated he would not, that the HOA could do what it had to and he was going ahead with construction. Kenny sent a letter that same date explaining the position of the HOA to defendant.
-12-

2m. The former member of the committee, Piper, kept a log of the meetings as the Declaration requires, from 1977 to the approximate time of his death in 2005. Upon Piper's death Kenny has maintained possession of the log. Kenny has reviewed the log and it was received in evidence and has been examined by the court. (Def. Exhibit 27).

2n. On August 26, 2005, DeCarlo sent a letter (Def. Exhibit 4) to Kenny. DeCarlo asked for arbitration on that basis of hardship, a permit by Park City had issued, and the encroachment was minor. That was left at the home of Kenny, who received it August 29, 2005, though Kenny was home between August 26 and 29, 2005. Also on August 26, 2005, counsel for defendant was on the site and observed the measurements. There is no factual dispute that the plans and in fact the construction to the date it was halted by the TRO encroaches on the ten foot setback, and that the proposed addition is approximately 6.5 feet from the property line between Lots 73 and 74. Defendant presented no evidence to the contrary. The footings and trenches and the foundation walls on top of the footings were poured in concrete sometime before the TRO was issued. This action was filed August 19, 2005, and the court attempted to schedule a hearing August 29, 2005, but that was continued at the request of defendant until September 16, 2005, when the TRO was issued.

2o. On September 26, 2005, the flooring, or pad, within the

-13-
foundation walls was poured, after issuance of the TRO.

2p. Lot owners purchase lots or residences subject to the Declaration and its rules and restrictions. The covenants run with the land. Owners are entitled to have the benefits of the Declaration as is the HOA as a whole.

3. The architect for defendant, DeCarlo, before submitting the plans to the committee and before obtaining a building permit on August 10, 2005, physically observed the subdivision and concluded in his own mind that there were no setback provisions that were being enforced based on what he observed. He walked and drove some of the subdivision and observed what he believed to be structures close together. He did not examine any documents, including the Declaration, nor make any measurements of other lots before submitting the plans to Park City or the committee.

4. Since the setback provision was brought to the attention of defendant and DeCarlo and since the litigation began, Decarlo has made a closer examination of the subdivision and has received several documents, including plans proposed and approved by the committee, given to him by the HOA in discovery. He has been to several lots and taken pictures and made some measurements. He testified about his observations and to some extent his conclusions. DeCarlo testified about just over twenty (20) situations, other lots in the subdivision, where defendant claims

-14-
there is a violation of the 10 foot setback provision or some other provision, some involving more than one lot. Those are claimed to show abandonment of the

setback provision by plaintiffs. The court will examine each of those situations and make findings and conclusions concerning each one.

5. Before detailing each lot, the court comments in a summary fashion on why it factually finds and legally concludes as it does. Generally the court does not find DeCarlo lacks credibility, but does find and conclude some of his "observations" are just that- observations. even though he has a trained architect eye, his observations and conclusions based thereon are not grounded on sufficient facts to merit his conclusions in each instance that there is a violation of the setback provision of the Declaration. A great deal of his factual presentation was based on his interpretation of the Declaration, which interpretation differs from the interpretation of the committee.

6. Specifically, DeCarlo testified that numerous other lots in the subdivision were in violation of the Declaration as to setback or other violations such as a structure being erected that is not allowed. Because of the legal standard involved the court will discuss each of the claimed violations and also conclude within these findings the meaning of the alleged violation and whether it supports the claim of abandonment.

-15-

7. The basic premise behind setback provisions as far as overall planning is so that the neighborhood has the feel of some open space and so that residents may enjoy the space between homes for various purposes, that sufficient light and space and visual corridors is allowed, that safety concerns are alleviated so that any fire in one residence will not quickly or easily spread to another residence, and that some privacy may exist between homes.

8. If the Declaration did not address a

specific area the committee determined, as do other subdivisions, to turn to the Park City Land Management Code (PCLMC, Def. Exhibit 115, Sec. 15-2.11-3(H) for instruction. In this instance because the committee did not believe that the Declaration dealt with decks, driveways, and patios and roof-overhangs and bay windows and chimneys, the committee basically informally adopted the PCLMC concerning those type of additions. That PCLMC provides, as exceptions to the setback provisions of that PCLMC, that decks under 30" in height are not subject to the five foot setback provision of the LMC but must be one foot from the property line. Driveways also are not subject to the setback provision of the PCLMC but must have 3 feet of landscape between the drive and the property line.

9. The court finds and concludes it need not determine whether the Declaration, under sections 6.1. et.seq., contain a

-16-

definition of structures nor what the term "structures" within the Declaration means. The section at issue, 6.4, has been interpreted by the committee, right or wrong, so that decks and driveways and such are not structures. Defendant interprets it, right or wrong, otherwise. Whether the court believes a deck is a structure or not is not material to the issue before the court and the court declines to interpret or find a definition of that term within 6.4. The issues surrounding abandonment are not whether this committee or these individual plaintiffs correctly interpreted the Declaration, nor whether they are wise or derelict or good at interpreting a Declaration. The issue is whether there has been an abandonment of a setback provision. whether that provision has historically been correctly or incorrectly interpreted.

The court is not concluding the committee has wrongly or rightly interpreted what "structure" means. The court is merely finding and concluding that the committee adopted the PCLMC as the committee did not believe structures within section 6.4 of the Declaration included decks, driveways, chimneys, and so on. Right or wrong, the basis of an abandonment defense is not the correctness of an interpretation of a Declaration term, but whether any provision AS INTERPRETED has been abandoned under the proper legal test. Thus, the court does not find the actions of the committee in adopting the PCLMC right or wrong, good or bad, clever or foolish. It is simply a

fact the court finds to be true, that the PCLMC was adopted and followed, and from that fact the court then determines if any provision as interpreted has been abandoned.

10. DeCarlo testified that Lot 37 (Def. Exhibits 123, 129) has a deck that is within about 10 feet of the home on the adjoining lot, thus the deck is clearly in violation of the setback provision as it basically touches the property line. The court finds, as noted above, that the PCLMC does not consider a deck to be a structure subject to the setback provisions in that code unless the deck is at least 30" high. The Declaration does not define "structure" and so the architectural committee "adopted" informally the PCLMC and does not consider a deck or patio a structure subject to the setback provisions. The court has a tendency to agree with defendant that from a fire protection standard that may make little sense, but it does make sense from a visual and space sense because a low deck is certainly less intrusive as to visual corridors and light than is a two story structure. Again, it is not the province of the court to determine

the wisdom of a Declaration, or its interpretation, given the issue in this proceeding. All the court is doing is determining, whatever the wisdom of the interpretation, is whether the provision as applied and as interpreted historically has been abandoned. Thus, indeed the deck on Lot 37 is closer to the property line than 10 feet but

-18-

this instance is not comparable to the two story structure at issue on Lot 73 and is not evidence that the setback provision has been abandoned.

11. DeCarlo testified about Lot 3 but it turned out that was actually Lot 20. (Def. Exhibit 125, 160). DeCarlo examined the plan provided by the HOA. However, that plan is found by the court show a roof plan. DeCarlo did not measure the distance from the structure foundation, not including the roof, to the property line. The drawings show virtually no roof overhang but defendant did not establish that the drawing reflected what is actually constructed, nor how close the actual residence, excluding the roof, is to the property line. This instance is some evidence of a violation of the 10 foot setback, but is not fully convincing.

12. As to Lot 10 (Def. Exhibit 126) DeCarlo produced a photograph of a deck that appears to be closer to a fence line than 10 feet. He assumed the fence was in fact on the property line. That is probably a reasonable assumption throughout, but as evidenced by the defendant/Stuart boundary and fence, Lots 73 and 74, the fence line is not always on the property line. Assuming it is here, the court finds that the home is in fact 10 feet from the fence line. The deck again appears to the court to be less than 30" high and thus was not considered by the committee to be a structure. This Lot is not comparable to Lot

-19-

73 and is not evidence of an abandonment of the setback provision as interpreted.

13. Lot 24 (Def. Exhibit 127) was challenged as being in violation. It contained a shed built next to a residence. DeCarlo admitted this was not in violation of the setback provision and the court finds it was not within 10 feet of a property line. DeCarlo asserted such sheds or structures are not allowed under the Declaration. Defendant argues that section 6.1 et.seq. show the only buildable structures allowed are a residence and garage. Plaintiffs urge another section of the Declaration, 5.12, allows such outbuildings. The court need not and does not decide that question. The issue here is not abandonment of any or all provisions of the Declaration, but the setback provision only. Thus, a shed or outbuilding is not relevant and is not evidence of an abandonment of the setback provision at all but is possibly some evidence of another violation not relevant to this legal issue. The court does not find or conclude that a shed is or is not allowable under the Declaration.

14. Lot 27 (Def. Exhibit 128) was a claimed violation based on the plans submitted and approved by the committee. However, the plans showed it was a patio that was nearer than 10 feet to the property line on one side. On the other side while the plans showed a residence closer to the property line than 10 feet,

-20-

adjacent to that line was a walkway between the adjoining lot and Lot 27. Thus, even had the structure been built, the distance between buildings for space and light and other purposes would have been far greater than 20 feet. Moreover, the structure was never built, the building permit has expired, and the lot sits vacant to this date. This too is not evidence of

a violation of the setback provision as the privacy and space concepts have not been violated, even if the structure had been built as planned. The reasons a committee might allow such a structure under these circumstances differ from the reasons for disallowing defendant's structure which would have been adjacent to Stuart's bedroom. This is not evidence of an abandonment.

15. Lot 41 (Def. Exhibit 130) was claimed to be in violation because a driveway was permitted closer than 10 feet to the property line, and the rear patio was claimed to be in violation also. Again the PCLMC does not require more than a three foot set back for driveways. This again is not evidence of a violation of a comparable structure as contemplated on Lot 73.

16. Lot 46 (Exhibit 131) was discussed with some vigor and claimed to be a violation of the setback provision. DeCarlo testified that the plan submitted and approved by the HOA showed a residence was 11 feet from the property line. DeCarlo measured from the residence foundation and found that 11 feet went to a small retaining wall that held a patio, and further to the rear

-21-

the residence was just over 6 feet from that retaining wall line. He did not measure or survey to find where in fact the property line was. Further, the drawing was not clear whether the 11 feet was from the roof line or foundation. The court is not satisfied by clear and convincing evidence that this Lot is in violation at least by the amount DeCarlo claims. There may indeed be a violation of the 10 foot setback provision with respect to this Lot 46 but the exact nature of the violation was not clearly shown, though it was probably about a 2 foot violation. More importantly, however, nothing

from the drawings approved by the committee shows that the "additional" violation (the approximate 2 foot violation) was shown on the drawings that were approved. In other words, the committee appears to the court to have approved a plan that did not violate the setback provision but the actual construction did violate that provision. Whether that was the fault of the builder or lot owner is not evident. This Lot 46 is at best a marginal violation that shows the setback provision has been violated but there is not strong evidence the violation of the setback provision was approved.

17. As to Lots 48 and 49, which have now become one lot but that number was not revealed, DeCarlo testified that from the approved drawings it appeared that the residence violated the 20 foot setback provision of the PCLMC from the street. He also claimed, at least at one time, that because the residence was

-22-

actually built across the original property line between Lots 4B and 49, that fact was a violation of the setback provision. The Declaration contains no setback provision from the street and the committee handles those on a case by case basis. (It was not clear to the court why the "default" provisions of the PCLMC are not incorporated in this instance when they are incorporated when the committee does not find the definition of "structure" in the Declaration.) The committee approved this construction which evidently was some distance, not revealed exactly, slightly closer to the street than 20 feet. It is not evidence of a setback provision relating to the distance between homes and is not comparable to the case at hand. This is a front door with windows slightly closer to the street than 20 feet, on two lots legally combined into one, that door

being slightly closer to the street than 20 feet allowed by the PCLMC. It is no indication of an abandonment of a side yard setback provision. Certainly the fact that the building is on two lots, legally combined into one, is no evidence of a violation of a setback provision.

18. Lot 50 (Def. Exhibit 133) is in violation of the 10 foot setback provision because the two residences (actually the "offending" structure is the garage on Lot 50 which garage is attached to the residence) are 15 feet apart, so either one or the other or both would be in violation of the 10 foot setback provision. DeCarlo did not find the true property line but from

-23-

this measurement showed that Lot 50 is in violation of the 10 foot setback provision. There were no plans available that show the plan was approved and the construction was before at least 1995 and that is known because Park City keeps the plans submitted to it for building permit purposes for ten years only. This was evidence of a violation of the setback provision. There is no clear evidence, however, that it was approved by the committee. As noted, it is not the function of the committee to determine that an owner builds what is approved. This lot remains evidence of abandonment and a lack of enforcement of the 10 foot setback provision.

19. Lot 55 (Def. Exhibit 134) was claimed to be in violation also. The building is in fact 12 feet from a property line. The approved plans may or may not show something different, but the court finds in fact this is not evidence of abandonment. Whether the plans were approved or not, and even if the plans show approval, the court finds it is in fact some evidence of enforcement action that the committee instructed the owner and those instructions or requests were

complied with. It is not evidence of abandonment.

20. Lot 56 (Def. Exhibit 135) involves a deck DeCarlo testified was within approximately 1.5 feet of the property line. The deck is under 30" again. This too is not convincing that the committee has approved comparable violations to that sought by

-24-

defendant. It is not evidence of abandonment that is convincing as there are reasons described above that the committee approves decks and patios and those reasons are persuasive to the court.

21. Lot 57 (Def. Exhibit 136) is also a deck that approaches the property line very closely. It is a deck clearly under 30" in height and is not evidence of a violation that is comparable to an actual two story residence being in violation of the setback provision. Further, this deck is against a property line of Lot 57 but on the other side of that property line the Park City Golf Course is found rather than another "neighbor" or residence and thus there is a far different situation from Lot 73 and Lot 74.

22. Lot 63 (Def. Exhibit 137) has a claimed violation of the setback provision in that a deck intrudes to within 7 feet of the property line, a three foot violation. There was some evidence of a visible stake but no survey was shown. The deck appears to the court to be in part lower than 30" and in part higher than 30" inches. There is no evidence a plan was approved by the committee but the violation is reasonably clear that the deck is closer than 10 feet to the property line. This is again some evidence of a violation but not of abandonment because there is no evidence that the committee approved this deck. Whether it is a case where a lot owner proceeded improperly without submitting any plans or there has actually been an approval by the committee

-25-
is not shown by defendant. The evidence is certainly not clear and convincing that the committee approved this deck.

23. The claimed violation on Lot 72 (Def. Exhibit 13B), adjacent to Lot 73 of defendant, is that there was a deck that was closer than 10 feet to the property line but there were no drawings that indicated the committee approved such a deck, which has now been removed in any event. The height of the deck was not shown. This is not an indication the committee approved any violation of the setback provision as with the other deck situations.

24. Lot 74 (Def. Exhibit 139), adjacent to defendant, shows that plans were approved that were in violation of the setback provision but in fact the building was erected such that it is not in violation of the setback provision. Measurements have been made and the structure is not within 10 feet of the property line. There are unanswered facts as to how that came to be and why, and to the court if any thing it is evidence that the committee discussed the issue with the Lot owner, Stuart (who was a trustee) and the building was modified after the plans were submitted. This lot is affirmative evidence that indeed the enforcement of the setback provision by the committee has been ongoing. It is most certainly to the court not clear and convincing evidence that the committee has abandoned the setback provision, but on the contrary evidence they have not done so and
-26-
that they seek to enforce it when possible.

25. Lot 77 (Def. Exhibit 141) is a claimed violation, actually two. One claim is that there is a shed which is prohibited and the other claim is that a glass solarium is in violation of the setback provision.

The shed is certainly not in violation of the setback provision. If the claim is merely that it exists in violation of the Declaration it is not relevant to a setback provision being abandoned. The solarium on the side yard is adjacent to an easement, a drainage area of some 15 feet, and then a neighbor's house is adjacent to that. Thus, the solarium is certainly not within 20 feet of another home and it is glass in any event. The property line is difficult to ascertain because of the drainage ditch and its somewhat transitory configuration because of flooding. The solarium thus does not impinge on the basic factors that are at the heart of the setback provision rationale in any event if in fact it infringes on the 10 foot setback area. Further, the evidence as to just where the property line is weak and not convincing. The solarium is 6 feet from the drainage ditch, which is again at least 15 feet wide in most places and then the neighbor's home is at least 10 feet beyond that. It is not evidence of anything comparable to this situation on Lot 73 involving, again, a two story structure adjacent to another home.

25. Lots 78 and 79 (Def. Exhibit 142) are claimed to be in

-27-

violation as photos taken and measurements show the rear of a residence is clearly within the 10 foot setback area on Lot 78 and an overhang of some type from Lot 79 is within the 10 foot area of the property line. The overhang is not a roof overhang but appears to be a veranda or deck above the ground on the second story. There were no plans obtained either from the committee or Park City, indicating either that the structure was before 1995 or there were no plans submitted. There were no precise measurements taken of the violation but the estimate was a three foot

encroachment on each lot. These lots each appear to the court to be in fact in violation of the setback provision. The evidence, however, shows no approval or knowledge by the committee, just that a portion of each residence is in violation of the 10 foot setback provision. There was testimony that Lot 78 was remodeled in about 2004 but the committee has no plans that allow the setback area invasion. There was also testimony that in the Summer season foliage blocks the view of the intrusions. These are each in violation of the setback provision but the evidence that the committee approved the violations is not strong.

26. Lots 83 and 84 (Def. Exhibit 143) are claimed by defendant to be in violation. A plan was submitted that shows a driveway and bridge encroaching some distance, not measured, into the 10 foot setback area. This again is not comparable to a

residence as it is a driveway and a claimed bridge but the court could not see any bridge from the photo introduced. This again was approved under the adoption of the PCLMC and is not comparable to a two story structure.

27. Lot 89 (Def. Exhibit 144) was examined by DeCarlo. There were no plans from the committee or Park City. A photo was taken which DeCarlo claims shows the house was eight feet from the fence line. There was no testimony as to the property line being on the fence line, but presumably the fence is the property line. Plaintiffs also measured the distance and found it to be 10 feet from the residence to a surveyor stake which was located. At best for defendant this may be some evidence of a violation but it is not strong. Again, there is no evidence it was known to the committee nor approved by them.

28. Defendant claims Lots 93 and 94 (Def.

Exhibit 145) are in violation. In that case the same person owns both lots and had plans approved and a house and garage erected that spans both lots. The home is on one lot, a breeze way spans the property line, and a garage is attached on the other lot. The lots have not been "combined" as were Lots 48 and 49 above, and thus defendant claims this is a violation of the setback provision. The court finds this is not remotely comparable to the Lot 73 situation at issue. The same person owns both lots 93 and 94 and presumably purchased both lots for more space and so he or she

-29-

could build such a structure and have ample space on each side yard from other lot owners. The situations are not comparable at all and no neighbor is possibly impacted negatively. Park City allowed that owner to do so and the committee merely acquiesced in that decision as the lots were owned by one person. It is not evidence of abandonment.

29. Lot 75 (P1. Exhibit 27) was discussed. It included old notes from the committee from 1979 and 1980 and shows that the committee finally approved a structure that intrudes beyond a chimney a few inches into the setback area. The chimney is construed by the committee in the same fashion as are decks and patios, but the committee did indeed approve a structure in 1980 that goes 4" beyond the chimney. It is some evidence of an approved violation.

30. In some type of summary of the claimed violations, some claimed violations do not relate to the setback provision at all, but deal with other structures and thus are really not relevant to the issue of abandonment of the setback provision. The greater number of the claims deal with decks and driveways or patios. This proposed addition was for a two story

home addition, even though it was in total for the two stories just under 44 square feet that would intrude into the 10 foot setback area. The addition on Lot 73 would be looking into the bedroom of the residence on Lot 74. Some of the drawings DeCarlo was given by
-30-
the HOA do not reflect the building that was actually erected. A plan or drawing may show no structure within the 10 foot setback area, but in fact the building (home or garage) has been built within the 10 foot area. Other plans may show a building that appears to encroach on the 10 foot setback area, but in fact the building was not erected in that space. In one instance no building has been erected at all and the lot sits vacant. From the latter situation defendant argues that the committee approved the plans in violation of the setback provision and that is evidence of abandonment, whatever actually happened thereafter. However, to the court the fact that then the home was actually built in compliance with the setback provision even though the plans show otherwise indicates to the court that there was work done by the committee, enforcement action taken with the lot owner to obtain compliance. If a plan is approved that does not violate the setback provision, and the lot owner or builder then erects a structure different from or in violation of the approved plan, and that structure is not clearly obvious to the untrained eye, the court cannot find from that situation that the committee was derelict or that it has abandoned the setback provision. It is the province of city officials, not the committee or HOA, to make sure what has been approved is what is being built. The court cannot possibly find from those facts that the HOA or the individual plaintiffs have abandoned any provisions of the
-31-

Declaration. Some instances also show the plans demonstrated that the structure to be completed would be in violation of the setback provision, but there has been insufficient evidence that the architectural committee actually approved the plans. All that was shown in some instances is that in fact a structure exists within the prohibited 10 foot setback area. From the above the court finds factually that most of the claimed violations are not indeed violations at all. Of the "structures" as the committee interprets that term that are closer to the property line than 10 feet, only Lots 50, 46, 20, 78 and 79, 89 and 75 involve a residence or garage. The others involve decks or drives or patios or sheds and outbuildings of some type. Of the "structures" as interpreted by the committee, there is no clear evidence except Lot 75 that the committee actually saw and approved plans which allowed erection of a residence closer than the 10 foot setback, and that was a 4 inch encroachment. The other situations involve either owners or builders doing something not covered by the plans or no approval of plans at all by the committee. The approval on Lot 75 was in 1980. There were and are 96 lots in Thaynes Canyon I Subdivision.

31. Again, factually as found and legally as concluded the committee is not "right" or "wrong" in their determination that decks and driveways are not structures under the Declaration. The issue is whether the committee has granted approvals

that show their interpretation of the Declaration has been abandoned, whether that interpretation is "correct" or not.

32. The court has examined the committee log (Def. Exhibit 27) which is basically the handwritten notes of Piper, now deceased. It begins in 1977 and

ends July 21, 2005, and shows many instances of discussions and enforcement of setback provisions as well as discussions of other covenants such as height. It discusses some finances, membership, and other things not relevant to this case. As to setback provisions, for example, an entry dated April 17, 1979, shows the committee received plans which had an 8' setback and the owner was advised and the plans were to be revised. A similar entry is found September 10, 1979; an entry discusses Lot 75 above; an entry discussing the 10 foot setback provision for January 29, 1980, and the owner agrees to change the plans; an entry for August 3, 1980 discusses the setback provision; an entry of October 2, 1989 shows an owner wanted a structure within 5 feet of the property line and the owner was told to revise the plans and that was done and they were approved; an entry from August 1990 showed an owner was told the home must be within setback limits and'the Declaration was left with the builder; an entry from April 1993 shows a discussion of setback provisions; an entry for a Stein Erickson property refers to the setback provision; an August 1997 entry discusses the setback measurement; a March 2000 entry shows

-33-

a garage enlargement would be 10 feet from the property line; an August 2002 entry shows a sideyard setback violation and there was a discussion of moving the "footprint" of the home; an August 2003 meeting shows a discussion of the 10 foot setback provision; an entry of April 2004 shows a discussion of a setback violation and a resolution wherein the property owner acquires more property; a June 2004 entry shows a discussion of the setback provision but mentions an easement adjoining the property; another August 2004 entry shows a new owner is advised of the setback

provision; there are entries as to this Lot 73 and defendant's plans up to the meeting of July 21, 2005. There are many entries dealing with height provisions of buildings as well. From these the court finds and concludes that the committee has for many years been diligent in enforcing the sideyard setback provision of the Declaration.

33. The court finds that the committee approved decks and driveways and patios within the 10 foot setback provision because those do not impact the feeling of space, do not enhance the danger of having structures too close together so that fire may spread (at least as to driveways), and do not impinge on privacy to the extent that an actual residence does that is within the 10 foot setback provision. Further, because the committee does not believe that decks and such are covered in the Declaration, they informally incorporated or adopted the PCLMC which did discuss

decks and patios and driveways. The committee actually, as admitted by DeCarlo, was quite strict in attempting to enforce the 10 foot setback provision.

34. All plaintiffs desire to enforce the setback provision in this instance. Under the Declaration, Sec. 7.1, any lot owner may enforce the Declaration conditions by a proceeding for injunction. Plaintiffs believe there are continued benefits to enforcing the setback provision by maintaining the character of the open space neighborhood and the privacy aspects allowed by greater space between buildings. The HOA recently in 2006 petitioner Park City to amend its LMC to change a provision that mentioned Thaynes Canyon I Subdivision so that the code reflected a 10 foot setback provision rather than the 5 foot provision previously stated in the LMC. That demonstrates to the court the ongoing desire to maintain the viability

of the setback provision in the Declaration and that such provision will have benefit in the future.

35. The Declaration, section 7.1, provides that if a court proceeding is instituted in connection with the rights of enforcement provided in the Declaration, the prevailing party shall be entitled to recover its costs and expenses, including reasonable attorney fees.
-35-

Based on the above findings and conclusions and discussion, the court makes the following additional:
CONCLUSIONS OF LAW

1. Defendant agreed to be bound by the covenants and conditions of the Declaration when he purchased Lot 73. Others in the subdivision have changed their plans concerning their homes to abide by the Declaration and to be a good neighbor. For example, there are entries in the committee log that show plaintiffs Peterson asked permission to plant trees and adjusted the plans of their home for various reasons to comply with the Declaration. The harm to plaintiffs is in part that many of them have made adjustments to their desires and the rules ought to apply to all members of the subdivision. The desirability of this neighborhood is obvious and the dangers in not enforcing the conditions of the Declaration are shown by the argument of defendant to the committee. That is, this is just a "minor" variation and won't hurt anyone. From that, the next owner could establish that approval as the baseline precedent and there is no end to where the arguments of others may lead. The conditions of the Declaration are a contract and it is certainly wise and good public policy to expect all to abide by their agreements. The Declaration specifically provides that its provisions may be enforced by a request for injunctive relief. The Declarations

have meaning and are applicable to all owners in the subdivision, and if taken lightly and ignored at the desire of any lot owner who wants a bigger residence, great harm to the integrity of the subdivision and harm to individual lot owners could occur. The contemplated structure has the possibility of eliminating favorable aspects of a view by adjoining property owners and reducing privacy. If the character of the neighborhood and subdivision is changed negatively by small and innumerable encroachments, the damages are incalculable in terms of money damages. For those reasons the threatened injury to plaintiffs is irreparable.

2. The harm to plaintiffs is such that the integrity of the Declarations weighs more heavily than any possible harm to defendant. Defendant had received warnings well before he applied for a building permit and was told the plans did not comply with the Declarations before any construction commenced. He was plainly told litigation would result unless he attempted to sit down and talk about the proposed plans. He proceeded at his own risk, and he was advised he was doing so. Plaintiffs sought to discuss the matter, and pleaded with defendant and his architect to modify the plans, which they did to make the residence "step back" so it would not be so visible. However, they would not alter the plans to comply with the Declaration. Defendant and DeCarlo were still told the plans were not

acceptable. Defendant refused to further modify the plans so that defendant could have his addition just as he wished, with a certain size room. The court, based on argument, issued a TRO, and construction continued. The court is not "punishing" defendant for

that seeming intransigence, but it is indicative to the court that defendant did not want to be a good neighbor in the sense of abiding by the clear requirements of the court issued TRO or the Declaration. Even considering defendant's argument to consider a balancing test, which of course must be done under Rule 65A, the issue is not what the cost may be to now remove the structure erected in part in violation of the Declaration, but the issue is what is the harm in requiring defendant, and all others, to comply with the Declaration in the first instance. There is no harm demonstrated in requiring defendant to build his addition so that it lies at least 10 feet from a property line. At most it appears from the plans that certain rooms would have to be somewhat smaller than desired by defendant. That harm is the harm as measured by the court, not the harm in "undoing" what has been done, or in remediating what has been done.

3. The court sees no public interest violated by enforcement of the Declarations, an agreement between the individual lot owners and the subdivision as a whole. In fact the public interest is in enforcing the Declaration, enforcing contracts

entered into freely. All courts have long recognized the important policies behind allowing restrictive covenants to be enforced by the citizens involved.

4. The preliminary injunction is made permanent as defendant has violated the conditions of the Declaration and should be enjoined from further construction that violates the Declaration.

5. The setback provision of Section 6.4 of the Declaration has not been abandoned. Under the test set out by our courts and as stated in the court's March 5, 2007, ruling and order, the court, has found and concluded as above that the number of violations of

that section do not merit a legal conclusion that there has been abandonment by either the committee, the HOA, or by the individual lot owners. As discussed at length above, only a very few of the 96 lots have residences, or structures as interpreted by the committee, that encroach on the 10 foot setback area. The evidence is not clear and convincing that the committee approved even those few. To be clear and convincing, defendant must produce in the court's mind a firm belief as to the matter at issue. Defendant must produce evidence such that there remains no substantial doubt as to the accuracy of the conclusion based on the evidence. Defendant has not done that as to the number and nature of the violations, nor as to the other elements of abandonment. As discussed above, only a very few actual violations exist, and that is not sufficient in number or

-39-

quality to show abandonment. The evidence most assuredly to the court does not leave the court with a firm belief that the committee or the citizens have abandoned the provision. That is because, right or wrong, the committee has not approved plans that allow an actual residence or garage to be built within 10 feet of a property line. While they have allowed decks and driveways to be so built, those are different and there is at least a reasoned basis for treating those differently from a two story structure. Again, even if wrong that a structure includes a deck or driveway, the committee has NOT allowed houses to be built in the prohibited setback area. At most, there are 5 actual violations and the evidence is convincing on only one that the committee knew and approved that. Considering there are 96 lots, even if all 5 were "approved violations" that is not sufficient to show abandonment over a long period of time. Defendant has

not shown by clear and convincing evidence that there has been substantial and habitual and general noncompliance with the setback provisions.

6. Even though the court probably need not examine the other elements of abandonment because the number and nature of the other violations is so slight and small, when the court does so the weakness of defendant's case is more evident. The facts as found clearly show the committee, as admitted to by DeCarlo, has been vigorous in denying approval for plans that sought to build

-40-

a residence or garage within the 10 foot setback area. Defendant has not shown a lack of enforcement and plaintiff has proven that enforcement has been ongoing for 30 years and there is a desire to continue that enforcement.

7. The setback provision is now strengthened by the adoption of a new PCLMC as to the sideyard setback provision which has been changed. The plaintiffs all desire to maintain the provision and the court concludes that defendant has not shown there is no benefit to the continued application of the setback provision.

8. The court is not dealing with any claim of variance or claim of lack of fair hearing. The court has found and concluded only that the restrictive covenants are enforceable, by injunctive relief, as they have not been abandoned, and plaintiffs are entitled to that injunctive relief.

9. Defendant, his agents and servants and all persons acting under, in concert with, or for him, are enjoined from any further construction which in any manner is in violation of the Declaration, section 6.4. Obviously any offending structure must be removed as well.

10. Under the Declaration plaintiffs are entitled to attorney fees and should submit an affidavit, defendant may respond, and the court will determine the amount of attorney fees and costs and expenses.

-41-

Plaintiffs are to prepare an order in compliance with URCP, Rule 7(f), adopting this ruling and stating clarifying language as to the removal of existing structure or structures on Lot 73.

DATED this 16 day of March, 2007.

S/ Bruce Lubeck

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050500426 by the method and on the date specified.

METHOD	NAME
Mail	BRET W REICH Attorney DEF 10885 S STATE ST SANDY, UT 84070
Mail	DENVER C SNUFFER Attorney DEF 10885 S STATE ST SANDY UT 84070
Mail	JOSEPH E TESCH Attorney PLA 314 MAIN ST STE 200 PARK CITY UT 84060
Mail	JASON S WILCOX Attorney PLA 314 MAIN ST STE 200 PARK CITY UT 84060

DATED this 19th Day of March, 2007.

Luwen K. Lee

Deputy Court Clerk

4. Federal Arbitration Act, 9 U.S.C. §1, et seq.

The Federal Arbitration ACT

Title 9, US Code, Section 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692), two new Sections were passed by the Congress in October of 1988 and renumbered on December 1, 1990 (PLS 669 and 702); Chapter 3 was added on August 15, 1990 (PL 101-369); and Section 10 was amended on November 15.

Arbitration

Chapter 1. General Provisions

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transaction", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any

other class of workers engaged in foreign or interstate commerce.

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in

proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Section 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Section 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Section 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed

with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Section 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Section 10. Same; vacation; grounds; rehearing

a. In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the

award upon the application of any party to the arbitration:

1. Where the award was procured by corruption, fraud, or undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
5. Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

b. The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

Section 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration --

a. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

b. Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

c. Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Section 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner

as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Section 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

a. The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

b. The award.

c. Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all re pects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Section 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

Section 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

Section 16. Appeals

a. An appeal may be taken from
   1. an order --
      A. refusing a stay of any action under section 3 of this title,
      B. denying a petition under section 4 of this title to order arbitration to proceed,
      C. denying an application under section 206 of this title to compel arbitration,
      D. confirming or denying confirmation of an award or partial award, or
      E. modifying, correcting, or vacating an award;
   2. an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
   3. a final decision with respect to an arbitration that is subject to this title.

b. Except as otherwise provided in section 1292(b)

of title 28, an appeal may not be taken from an interlocutory order --

- granting a stay of any action under section 3 of this title;
- directing arbitration to proceed under section 4 of this title;
- compelling arbitration under section 206 of this title; or
- refusing to enjoin an arbitration that is subject to this title.

Chapter 2. Convention On The Recognition And Enforcement Of Foreign Arbitral Awards

Section 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Section 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a

corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Section 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Section 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Section 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of

causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Section 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Section 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Section 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in

conflict with this chapter or the Convention as ratified by the United States.

Chapter 3. Inter-American Convention On International Commercial Arbitration

Section 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

Section 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

Section 303. Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American

Convention.

Section 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

Section 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

1. If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

2. In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

Section 306. Applicable rules of Inter-American Commercial Arbitration Commission

a. or the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

b. In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

Section 307. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

5. Trial court decision setting aside arbitration award dated October 6, 2005.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JAMES J. KENNY, PATRICIA D. KENNY, JAMES E. B. STUART, EILEEN A. STUART, ROBERT C. SLETTOM, FAY SLETTOM, RICHARD L. MEASELLE, CHASE PETERSON, GRETHE B. PETERSON,
PLAINTIFFS.
V.
JOHN L. RICH,
DEFENDANT

CASE NO. 05050428
JUDGE BRUCE LUBECK
MEMORANDUM DECISION
DATED OCTOBER 5, 2005

The above matter came before the court on October 5, 2005, for oral argument on various issues. Plaintiffs were present through Joseph. E. Tesch and defendant was present through Denver C. Snuffer. The case has taken on a unique life of its own and substantial background is needed to understand the issues and arguments and the court's ruling.

The court has reviewed the pleadings of the parties and the entire file, and heard argument and

concludes as follows:

BACKGROUND

On August 19, 2005, plaintiffs filed a complaint. It alleged they were owners of property in Thayne's Canyon, Summit

-1-

County, and that plaintiff Association was created in 1971, and there was a Declaration recorded. They contained the conditions, covenants and restrictions on the property, commonly CC&Rs but herein Declaration. All parties took their title to property subject to that Declaration. Section 6.4 of that Declaration requires a 10 foot setback from the side and rear lines for any buildings and structures. During or before July, 2005, defendant was given a building permit by Park City, based on the Park City Municipal Code which requires only a five foot setback, and as planned the addition would have a setback of only 6.8 feet from an adjoining lot. On July 21, 2005, the Trustees of the Association advised the architect for defendant, DeCarlo, that the Declaration would be violated if the addition to defendant's home was built as planned. DeCarlo allegedly stated that court action would be required to halt the construction, and the construction began. Later on August 12, 2005, plaintiffs advised defendant that court action would be filed unless the matter could be resolved. When it was not resolved this complaint was filed, and plaintiffs seek an injunction against defendant and his agents from continuing construction on Lot 73 and seek a declaration that the Declaration of 1971 does not permit construction within 10 feet of other lots and seek damages for breach of contract.

Plaintiffs also moved for a temporary restraining

order on
-2-
August 19 ,2005. The court originally set a hearing on the request for August 29, 2005 advising plaintiffs through the clerk of the court that notice must be given to defendant. On August 26, 2005, Denver C. Snuffer sent a letter to counsel for plaintiffs indicating that defendant, who resides in California, was out of the country and asked that the hearing set for August 29, 2005, be rescheduled. The letter further indicated the court had no jurisdiction because there was an arbitration provision in the Declaration. On August 30, 2005, the court sent notice that a hearing on the request for the TRO would be held September 16, 2005.

Plaintiff sent certified letters to defendant and Snuffer on September 6, 2005, advising them of the September 16, 2006, hearing.

On the day of the hearing, September 16, 2005, defendant, filed a motion to quash the summons and a motion to dismiss and indicated counsel was there only to contest jurisdiction. Defendant alleged the summons was served but it did not have an endorsed date nor a signature of the person serving the summons nor the title of the server, and was in other ways in violation of Rule 4, URCP. The motion alleged the summons was left on a porch of defendant and he found it and does not know when it was left. As to the dismissal motion, defendant alleged that Section 8.3 of the Declaration governs and requires arbitration and that the court
-3-
was without jurisdiction.

The summons defendant had required an answer within 20 days. An affidavit of Snuffer indicated he had been asked to represent defendant.

Also on the date of hearing, plaintiffs filed a

memo and exhibits in support of the request for the TRO. The loss and irreparable harm was alleged to be that the Declaration needed to be enforced or it would be meaningless, and there was a loss of open space, privacy and value to adjoining lots. The motion for the TRO alleged defendant was building a 25 foot high addition which was only 6.8 feet from the property line. It was claimed that the addition would also restrict any possible fire lane between the residences of the Stuarts and defendant' lot, Lot 73.

One of the attachments was a letter filed August 26, 2005, from DeCarlo, the architect for plaintiff, to plaintiff Kenny, asking that arbitration occur under the Declaration. In response on August 30, 2005, plaintiffs, through a letter from Kenny, advised DeCarlothat the arbitration had been waived.

Another attachment showed that on September 8, 2005, Snuffer advised plaintiffs he did not have authority to accept service and that defendant demanded that the defendant be personally served.

A proof of service was filed also as an attachment by

-4-

plaintiffs. It was signed by Bob Shultz, September 6, 2005, indicating he served "Jane Doe, wife, 45 yrs, cau, fe, 5'5, 145 lb, brn hair" at the address of defendant, 4162 Dover Cir., Cypress, California, on August 27, 2005 at 9:30 a.m. Shultz represented himself to be a Registered California process server, and the proof was sworn to under penalty of perjury. The summons and complaint and motion for TRO was served according to the certification. The process server also swore he mailed a copy of the above materials on August 29, 2005, to the same address, from Long Beach, California. Shultz had previously made unsuccessful attempts at service of process at the same address on

August 23. and 25, 2005.

In a pleading filed October 4, 2005, Shultz filed an affidavit that indicated he returned to the same residence of defendant Rich on September 22, 2005, and the same woman he served in August answered the door at about 6:00. She was in sleeping attire and indicated Shultz had just awakened her and Rich was not available. She had also stated Rich was not available on August 27, 2005, and on each occasion stated she would not sign for anything.

Kenny filed an affidavit indicating that a special meeting of the Trustees of the Association was held July 21, 2005, and that plaintiff Stuart reported. DeCarlo's intent to proceed with construction. Kenny called defendant and left a message on his

-5-

voice mail about the Declaration requirements of a 10 foot setback and that legal action would be taken if defendant did not halt his construction which was contemplated. Kenny also called DeCarlo who said Park City had issued a permit and only required, a five foot Set back and he and defendant would not comply with the Declaration. Kenny advised legal action would be taken. Excavation commenced August 13, 2005. Kenny called defendant August 14, 2005, and advised him to cease and defendant stated he was going ahead with construction and the Association could proceed as it wished. Kenny sent a letter to defendant that same date. Kenny states he received on August 29, 2005, a letter on his doorstep from DeCarlo, dated August 26, asking for arbitration. Kenny responded August 30, 2005, stating arbitration had been waived. Kenny attached photos which show construction work in progress.

Also attached was the affidavit of Patricia Kenny. She confirmed most of the information from

James Kenny and attached a copy of the minutes she made of the July 21, 2005, Trustee meeting.

Stuart attached an affidavit indicating he also took photos. He stated that the head of the architectural committee, Piper (who passed away since July 21, 2005) saw the plans of defendant earlier in July, before the July 21 meeting of the Trustees. On July 19, 2005, DeCarlo who said he was the architect appeared at

-6-

Stuart's home with plans, which showed. the addition to defendant's home that would be 6.8 feet from Stuart's property line. Stuart said he objected and DeCarlo said he was going ahead as Park City had issued the permit and DeCarlo had not seen, nor did he care about, the Declaration. On July 20, 2005, Stuart gave DeCarlo the Declaration, and DeCarlo said again he would not comply with those requirements. Stuart confirmed the July 21 meeting and stated he was the adjoining property owner to Lot 73 and that DeCarlo knew that the building as planned was opposed by the Association.

At the hearing held September 16, 2005, counsel appeared. The court heard argument and required that the parties complete arbitration within 14 days and granted the TRO, to be effective until further order of the court.

Defendant argued that arbitration was required and plaintiffs argued it had been waived, but indicated they would submit to arbitration in any event if the court ordered arbitration. The court did not rule on the motion to quash nor on the motion to dismiss, those motions having only been filed the day of the hearing and no response having been filed. The court signed an order that date, later supplemented September 21, 2005, that defendant and his agents and servants and

all persons acting under defendant or in concert with him stop continued construction of the addition on Lot 73, in any manner which

-7-

impinged on the 10 foot set back provision of the Declaration. The parties were to cooperate fully with each other to complete the arbitration and the order was to be in effect until further order of the court as orally stated. The court ordered the parties to contact the court after arbitration, if necessary, for further hearing.

On September 21, 2005, defendant filed a letter to plaintiffs' counsel indicating defendant did not have a wife and that the service was improper.

The docket shows that on September 27, 2005, plaintiffs responded to defendant's motion to quash and motion to dismiss though as of October 3, 2005, those responses were not in the file Plaintiff's sent by facsimile those responses and the originals docketed, have evidently been misfiled in another case.

In opposition to the motion to quash plaintiff asserts Rule 4 has been complied with. There is no requirement for notations on the summons as to who served the summons.

In response to the motion to dismiss plaintiffs argue that arbitration was waived under the Declaration, as defendant knew his position had been rejected July 21, 2005, and before, and his request for arbitration was at earliest August 26, 2005.

On September 27, 2005, plaintiffs filed an ex parte motion for an expedited order to show cause as to why defendant,

-8-

Snuffer, DeCarlo and Brent Reich should not held in contempt.

The request recited the September 16, 2005,

TRO and history. Plaintiffs alleged defendant had refused arbitration, in that when he signed an acknowledgment to arbitrate, Snuffer set forth additional conditions, that he did not waive the insufficiency of service of process argument, and the motions under advisement, and that the appearance of Snuffer did not subject Rich to the court's jurisdiction. Plaintiffs argued and alleged that insertion and condition was an attempt to disavow any arbitration award and was as an effort to state the arbitration panel was without jurisdiction if the arbitration award should go against defendant.

Further plaintiffs alleged that on September 26, 2005, construction was continuing. Plaintiff on September16, 2005
sent an e-mail to Snuffer that the court had signed the TRO, and a copy was attached. On September 19, 2005, plaintiffs told Snuffer they assumed he represented Rich and had advised Rich of the TRO and if that was wrong, plaintiffs should be advised. Snuffer indicated he did represent Rich, Kenny attached an affidavit which indicated that he saw concrete being pumped into the disputed area on September 26, 2005. DeCarlo was on the site and Kenny tried to give DeCarlo a copy of the TRO. DeCarlo said he was aware of the TRO but it was invalid and he would not accept it. Kenny read the TRO to DeCarlo on site but DeCarlo
-9-
interrupted and would not listen. DeCarlo stated Rich had not been served and the TRO was not valid until then. Pictures were attached, Kenny alleging he took them, showing workmen pouring and working in concrete in presumably the disputed area.

Also filed was an "amended" proof of service signed by Shultz, indicating the person served on August 27, 2005, was a "co-tenant" rather than "wife."

It was dated September 26, 2005.

Plaintiffs requested an order to show cause and that the September 28, 2005 scheduled arbitration be cancelled until defendant submits to the jurisdiction of the panel.

The court signed the order to show cause, setting the hearing October 5, 2005, at 9:00 a.m. The court ordered that service could be made on Rich and Snuffer by mail and the other two named persons were to be served. The order stated "since defendant now objects to the jurisdiction of the Arbitration panel, the court ordered arbitration is cancelled until further notice; and . . ."

Defendant Rich through Snuffer then moved on September 28, 2005, to continue the October 5 hearing. The court scheduled a phone conference for 9:15 a.m. October 3, 2005, and rescheduled the hearing until the same date, October 5, 2005, at 1:30, and the court indicated it would hear all issues and determine what , it could.

On September 29, 2005, plaintiff filed a response to the

motion to continue, indicating no objection if the TRO remained in effect and the other parties agreed.

On September 30, 2005, defendant Rich filed a "renewed" motion to dismiss. It contained additional grounds for dismissal. Snuffer indicated in the motion he was appearing specially for the limited purpose of the motion to dismiss. He alleged that arbitration had occurred on September 28 2005, and no court involvement was required. He attached a document entitled an "Interim Award" by arbitrators Kent B. Scott, David W. Slaughter, and K. Gordon.

That document recited those persons had been appointed under the Declaration and the September

21, 2005, agreement of the parties. It indicated that on September 28, 2005, Snuffer was present for Rich but plaintiffs were not present, despite notice and agreement to participate.

In the award, it was noted the parties agreed to arbitration in this case. The rejection of a variance sought by Rich was stated to be unreasonable and he was entitled to a variance. He was allowed to proceed with the addition under the current plans. Rich was awarded attorney fees as the prevailing party and an affidavit was to be submitted concerning those fees. As additional comments, the panel stated that the parties empowered the panel by their agreement.

The Written Comments of the panel indicated that by entering

into the agreement, the parties empowered the panel to hear the matter. Then, plaintiffs herein told the panel the court had cancelled the arbitration. The comments indicated that the parties acknowledged they would agree to arbitrate all issues in this case that is before the court and acknowledged the appointment of the panel. On September 23, 2005, a preliminary conference was held between the parties and the panel and no objection was expressed to the panel. Defendant herein, through counsel, indicated he had reservations about the court's jurisdiction but had no concerns about the panel's jurisdiction. Hearing was scheduled for September 28, 2005, and pre-hearing issues were discussed, as well as motions, discovery, exchange of witness and exhibit lists and pre-hearing briefs. Defendant added language about reservations about the jurisdiction of the court, but not the panel. On the afternoon before the hearing, plaintiffs' counsel made a request to cancel the arbitration based on the fact that defendant had objected to the jurisdiction of

the panel. The arbitrators indicated that was not true, defendant had not objected to the jurisdiction of the panel. The comments then suggest that before the panel could consider the request or invite a hearing, plaintiffs obtained an ex parte order cancelling the court ordered arbitration. The day before the hearing the panel received the order of the court cancelling the arbitration. The panel then determined the hearing should

-12-

proceed and the panel should hear plaintiffs' request to cancel and matters related to the panel's jurisdiction.

On the date of hearing, Snuffer was present for Rich and the panel called counsel for plaintiffs, who on the telephone refused to discuss the matter, stated he would not participate because the court had cancelled the arbitration and that he would state his position in writing. Rich indicated he was not objecting to the panel's jurisdiction. Later plaintiffs' counsel sent a letter stating he considered the arbitration court ordered and the panel had no jurisdiction to hear the matter. The panel indicated that although the court ordered the arbitration, it ceased to be court ordered when the parties signed the agreement to arbitrate. Thus, the panel justified its action, by stating the hearing not pursuant to court order but was pursuant to court agreement consistent with the Declaration, which granted jurisdiction to a panel for arbitration. Both sides paid for one arbitrator and, agreed to split the cost for the third member.

Also on September 30, 2005, defendant moved to dissolve the restraining order. He argued that the arbitration, was complete and there was nothing for the court to do and the matter was now moot. No bond was posted and defendant claims a bond must be posted and that such is mandatory.

Also on September 30, 2005, defendant responded to the order to show cause. Defendant claims it is false that defendant did

-13-

not agree to arbitrate, and defendant did participate in arbitration under the contract, the Declaration and the pre- arbitration agreement presumably, and not pursuant to court order. Defendant again claims the court has no jurisdiction over Rich and cannot order anything concerning Rich without service on defendant personally. It was argued Snuffer and Reich are not parties but are counsel, DeCarlo is not a party, and the arbitration was conducted under contract not court order. Further, the TRO is invalid on its face.

Defendant makes these arguments and asserts DeCarlo is not a party, and neither are defendant's attorneys. Because DeCarlo is not a party, an order cannot be directed at him according to defendant. Defendant asserts also he did not go to the arbitration as a result of the court's order, but as a result of an agreement. No summons was served and so the court cannot order Rich to do anything according to him.

In an affidavit filed October 4, 2005, Joseph E. Tesch, counsel for plaintiffs, asserts the Panel did not call him on September 27, 2005, to indicate the Panel was going to go forward and conduct an arbitration hearing. He asserts on September 28, 2005, a Panel member called him and stated the court, this court, was without jurisdiction to cancel the arbitration hearing. The Panel then told Tesch they intended to proceed without him, after Tesch indicated the court had ordered the arbitration and the

-14-

court had then cancelled the arbitration.

Also on October 4, 2005, plaintiffs filed an opposition to the renewed motion to dismiss and an

opposition to the motion of defendant to dissolve the "TRO.

Also on October 4, 2005, defendant filed a reply memorandum in support of his motion to dismiss. Filed with the reply was an affidavit of DeCarlo wherein he asserts defendant did not give him a copy of the TRO and while plaintiff Kenny attempted to give DeCarlo a copy, DeCarlo refused to read it. He states that Kenny is a party and cannot serve papers. He asserts the work has now ceased after he was served with the Order to Show Cause, and defendant's damages are accruing.

Also attached is an affidavit of Deborah DeCarlo, who states she is the daughter of defendant and that her mother, the wife of Rich, died approximately ten years ago, and Rich does not cohabit with anyone and resides alone in California.

DISCUSSION

1. Motion to Quash.

The court is faced now with competing affidavits about whether that service of the summons was complete on August 27, 2005. The affidavit of Deborah DeCarlo is made, in large measure, without personal knowledge. She could not know, as a resident of

Utah, whether there was a person, a woman, at the residence of Rich on August 27 and September 22, 2005, as the process server asserts. Certainly she has personal knowledge about whether her father is married or regularly cohabits. The court is not suggesting he does cohabit, but the court does credit the

affidavit of the process server, with its presumption of regularity, that he is a non-interested process server and served the summons as indicated. There is

sufficient indicia that the
woman, whoever she may be, resided there as reguired by Rule 4, URCP.

On the morning the court is issuing this ruling Rich faxed an affidavit. The court is tempted to disregard it as untimely, but the court will consider it. Rich evidently now in Indiana at least according to the notary seal, states no one resided in his residence other than himself, Mr. Snuffer was engaged only to challenge jurisdiction, Rich had not been served, his son found a summons on the porch and one in the mailbox, and the court has no jurisdiction.

Parenthetically, in a statement not lost on the court, it was represented that Rich was a former attorney with the military and is familiar with these matters and knows that there, is no jurisdiction over him until he can be served. There have been several representations that Rich was out of the country at various times, that he travels a great deal, and this affidavit,

-16-

as noted, was signed in Indiana.

The court directly asked defendant twice on October 6, 2005, if he believed the court needed an evidentiary hearing to hear the process server and any other witnesses to make a credibility determination about whether service was valid under Rule 4. The question was not answered by counsel. Such a hearing would be a benefit to the court without doubt but would amount to further delay and defendant claims he is being damaged by the delay because the building season is rapidly disappearing in county.

It is defendant challenging the court's jurisdiction. Given the presumption of regularity and the notion that litigation is not to be delayed inordinately by such matters or by attempts to avoid

service (the court is not saying that is occurring), the court believes it is defendant's burden to overcome the presumption of regularity and provide evidence that service was not proper. Defendant has done that to the extent of defendant's affidavit. Some of his affidavit (my son checks my home every day) is not admissible and is not considered. Still, the court does not believe it is making a credibility determination based on affidavits. Based on the affidavit of Shultz that the woman was in sleep attire and stated she was awakened by Shultz, the court believes that qualifies as residing. The affidavit of the daughter does not defeat that as the daughter could not know,

-17-

residing in Utah, whether a woman was there on the dates indicated. Simply put, given the competing affidavits and without an ability to determine credibility, the court again extends the invitation to defendant for an evidentiary hearing where the court can hear from any and all witnesses relating to this motion and the service or lack thereof. Absent that hearing, the court believes the presumption of regularity from a dis-interested registered process server who provides great detail overcomes the affidavit of defendant.

As to the other arguments for the invalidity of the service the court finds them without merit. The summons served did erroneously state an answer must be filed within 20 days. Rule 12(a) allows thirty days to answer when service is completed outside of the state of Utah and 20 days when service is within the state. However, that does not merit quashing the summons. An extension could be sought to file an answer and would be granted if asked for in this case. In any event, no answer has been filed but a motion to dismiss has been filed. The court will allow 30 days for an answer

if the case gets to that point. The misinformation conveyed in the summons does not go to the heart of the basis for service, and that is notice. It does not affect the core reasons for the timing of a response.

As to the failure of notation on the summons served, defendant is simply wrong. Current Rule 4 does not require such.

-18-

A prior Rule 4(j) did require such notations on the summons that is no longer the rule.

Defendant argues counsel did not appear generally on September 16, October. 6, or perhaps in the future. However counsel clearly knew of the hearing, as did defendant. 12(b) has eliminated the need for "special" and "general" appearances as "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection." In short, all of the claims about special and general appearances, are without merit entirely.

As to notice, the court did not and would not, under the facts of this case, issue a TRO without some notice to the opposition, absent compliance with URCP, Rule 65A(b)(1)(A) and (B). That happened and Snuffer appeared. The court believes, in following the law, that notice is to be provided. The court does not believe the rules are to be used, however, to defeat substantial justice.

The motion to quash is RESERVED until further hearing as discussed below. The court simply cannot determine, based on the competing affidavits, whether service happened as plaintiffs claim or if it did not happen properly under the rules.

-19-

2. Motion to dismiss.

Defendant has, in the view of the court, attempted to have both sides of the argument here. He insists he wanted and still wants arbitration but took steps, in the view of the court, to halt that process which would have and could have and should have been an end of this case.

In opposition to the request for a TRO, defendant argued in open court that arbitration was required and the court had no jurisdiction under the Declaration of 1971 because arbitration had been demanded and was required before court intervention. In part based on that argument, and in part based on the willingness of plaintiffs to submit to arbitration if the court required it even though plaintiffs argued arbitration had been waived, and in part because this case involves, in the words of someone, a "war over five feet" of property, the court believed arbitration was wise and would most readily and speedily resolve the issues involved before construction went too far and before the construction season was lost.

Thus, the court ordered arbitration as a part of and as an extension of the TRO. The court simply equitably stopped further work, and tried to get the parties, all seemingly competent, well off and adults, to get together with someone neutral and work out this issue involving a building three fee four inches closer to a property line than someone wants. The court did NOT RULE whether

-20-

arbitration had or had not been waived, the court DID NOT rule whether the court had jurisdiction. Obviously in issuing any order the court assumed it had jurisdiction but there was no ruling on that issue. The motion to dismiss was not decided but the court had to rule on the TRO request. The act of issuing the TRO obviously assumes the court had jurisdiction to

some extent, however, and to some extent assumes arbitration had been waived. Because of the emergent nature of the TRO hearing those issues had not been fully briefed and the court had, not had time to fully consider those issues. The court issued the TRO as an equitable measure with the clear intent that work stop, the parties arbitrate, a result would be achieved speedily, and if that failed the parties would return to court and the issues of jurisdiction, waiver of arbitration, and any other issues, would be considered and resolved. Unfortunately, those well intentioned plans did not materialize and the case, beyond even the above issues, has taken on a life (or death) of its own.

Upon more careful examination now it is apparent that the court had and continues to have jurisdiction. The court ordered arbitration, and if that was not successful, the parties were to contact the court and further proceedings, relating to jurisdiction and a possible preliminary injunction would be explored. Nothing in law has removed this court's jurisdiction and nothing in the facts of this case has removed this court's

-21-

jurisdiction.

Defendant wanted to arbitrate and plaintiffs did not because they argued defendant had waived arbitration according to the arguments held September 16, 2005. The court ordered arbitration as part of the solution to the problem the parties were involved in. The later "agreement" signed b counsel for the parties arbitrate was based on court order.

The parties then began that process of arbitration, hired and paid for them, and signed an agreement to arbitrate. When plaintiffs signed the agreement to arbitrate with the panel, they affixed language that "Counsel for the parties acknowledge

and agree that the above referenced matter may be arbitrated in accordance with the Utah Revised Uniform Arbitration Act and accept the arbitration panel as on the terms and as provided for in this letter. Agreed subject to Plaintiffs' Right to seek attorneys' fees and costs since the arbitration is simply an extension of the court proceedings in the Third Judicial Court at No. 050500425."

To the language of the agreement that "counsel . . . Acknowledge and agree that the [matter] may be arbitrated in accordance with the Utah Revised Uniform Arbitration Act and accept the arbitration panel as on the terms and as provided for in this letter" defendant's counsel then wrote in a handwritten addition: "On condition that this does not waive any right of my

-22-

client; who objects to the jurisdiction and sufficiency service of process. There are pending motions to dismiss before the Court which are under advisement. My appearance does not subject my client to the Court's jurisdiction. See Exhibit 3 attached." The court is not aware of what Exhibit 3 was.

Based on that language plaintiffs interpreted, correctly and wisely in the court's view, that defendant was willing to have an arbitration panel examine the issues, but if that panel action was unfavorable to defendant, defendant could still claim, the court had no jurisdiction to order the arbitration to enforce the arbitration award and so the arbitration was not effective.

Defendant and the panel have interpreted the language inserted by defendant differently from the court, and incorrectly in the court's view. They deem additional language is merely preserving arguments as to the court's jurisdiction. Whatever issues existed

about jurisdiction are not for the Panel to determine but for the court.

However, the court's jurisdiction was at that point irrelevant. If the parties submitted all issues to arbitration, the TRO was meaningless as all issues would be resolved in arbitration and there was no reason to be concerned about the court's jurisdiction whatsoever. Defendant clearly inserted that language in the "agreement" for a purpose and preserving an argument as to court jurisdiction was irrelevant and was

-23-

was unnecessary, as noted, under Rule 12(b). This inserted language was not needed in the face of Rule 12(b). All of defendant's arguments and affidavits and discussion about "preserving" jurisdictional arguments are without merit under Rule 12(b). A "special" appearance is meaningless under that Rule.

For that reason Rich had notice under our rules. That is also the reason the court allowed the Order to Show Cause discussed below, to be served on counsel as that is notice in this case.

Further, the court believes the inserted language fairly could be considered as a mechanism by defendant, when considered in conjunction with other arguments asserted as a further attempt to obfuscate and delay and continue work on the project. Had arbitration been engaged in, as ordered by the court as part of the TRO process, defendant could argue under that insertion he made that the panel decision was invalid because the court had no jurisdiction to order the arbitration, even though defendant claimed he wanted arbitration. The inserted language by counsel, caused plaintiffs to believe, again correctly in the view of the court, that defendant was attempting to seek arbitration but attempting to avoid it if it was

unfavorable to him. It could and did reasonably appear as a tactic to avoid resolution of the issues. Even if there was an award it must be confirmed by the court, and defendant left it open to argue the court had no
-24-
jurisdiction and so any award may not be confirmed. As noted repeatedly, it was simply unnecessary under Rule 12(b) to "reserve" a jurisdictional argument.

Where defendant and the Panel erred is in believing that because the parties signed an "agreement" to arbitrate that the arbitration was not court ordered, but pursuant to that agreement. Plaintiffs signed the agreement ONLY BECAUSE the court ordered them to as part of the TRO process. That is clear from the record and the language inserted by plaintiffs in the "agreement." The court ordered arbitration before a preliminary injunction hearing, believing it was the most efficacious means to solve an immediate problem. Plaintiffs believed and argued, correctly the court now rules that arbitration had been waived. Plaintiffs did not believe arbitration was necessary under the Declaration as it had been waived untimely demanded.

An "agreement" to arbitrate is enforceable except upon any ground that exists at law or equity for the revocation of a contract. UCA 78-31a-107(1).

Thus, for the Panel to take upon itself the position that it had jurisdiction because the parties "agreed" to it and that the court, had no jurisdiction to cancel arbitration was completely incorrect and was indeed a rejection of or disobedience of a court order. The Panel could have and should have sought clarification from the court before acting in the face of an
-25-
order that cancelled arbitration. Again, the court's

jurisdiction is not determined by this Panel, whatever they think their powers may be. The Panel, for some unexplainable reason, instead took it upon themselves to hold an arbitration hearing even when one party stated that the court had cancelled arbitration, they Panel was aware of that order, and that was the reason for non-participation by plaintiffs.

There was in fact no "agreement" to arbitrate for two reasons. First, arbitration was done because the court ordered it even though it is now clear it had been waived and was not properly demanded. Second, the "agreement" to arbitrate is void because it is ambiguous and does not amount to a meeting of the minds. Defendant's insertion of additional "conditions" which effectively would allow him to claim the arbitration was not binding was NOT agreed to by plaintiffs. There was a failure of agreement on the necessary and essential conditions. Thus there was no contract or agreement at all.

The Declaration was an "agreement" to arbitrate, but only under the circumstances and conditions within that document. It was waived as indicated below.

Even if the demand for arbitration was timely, notice under Utah law of a desire to participate in arbitration must be in conformity with Utah law, UCA 78-31a-110, or in other words, must be by certified or registered mail, and the nature of the dispute

-26-

must be set forth. That clearly did not occur in this case. There was no valid demand for arbitration nor was the demand for arbitration timely.

The "demand" in the form of a letter from DeCarlo was at earliest August 26, but probably August 29, 2005. Defendant knew of the decision of the Association Trustees July 21, 2005. The demand was

not timely and arbitration was waived under the Declaration.

Based on the representation of plaintiffs as to that additional language inserted by defendant, the court then ordered that arbitration be cancelled. How the Panel could interpret that unambiguous order cancelling arbitration as meaning only the court-ordered arbitration was cancelled, but not the "agreed-to" arbitration is beyond the court's thinking. The arbitration was completely and solely court ordered, as an accommodation to defendant in fact, and done for reasons that seemed to the court to be the most sensible and speedy way to resolve this dispute over less than five feet of property. The court may not order arbitration if there is no agreement do so. The TRO issuance under the condition of immediate arbitration was, again, an accommodation to defendant and seemed a practical way to solve the issues. However, the arbitration was not based on a valid agreement to arbitrate because that desire for arbitration had been waived by the untimely request for such arbitration. Thus,

-27-

the arbitration ordered was the sole basis for plaintiff's participation and that order was improvident and incorrect. The claimed "agreement" signed by the parties, then, is not a valid contract or agreement based on these equitable principles and based on the clear notion in contract law that there must be an agreement of the parties, a meeting of the minds. There was not such when defendant added his conditions.

The arbitration interim award is VACATED and is of no effect. The Panel had basis to hear the matter under the facts of this case. The Panel improperly refused to postpone the hearing upon a showing of

sufficient cause, namely, the court had ordered it cancelled. Plaintiffs properly refused to participate and told the Panel the reasons for such refusal, namely again, the court order cancelling the arbitration.

The Declaration clearly states, Section 8.3. that any party which includes defendant, desiring to arbitrate any controversy shall file written notice of that desire with the Association and any other party within 30 days of when he discovers or learns or has notice of such determination or action or decision of the association. As noted, defendant clearly knew more than 30 days before August 29, or August 26, 2005, that the Association would not grant a variance or Waiver. There was thus a dispute and any notice of a request for such was thus untimely as filed. Arbitration was thus waived.

-28-

The court vacates that portion of the TRO which requires arbitration. Given the positions of the parties herein and their seeming inability to agree on anything, court orders are clearly the only possible resolution herein.

Defendant suggests a re-referral for arbitration to the same panel. Plaintiffs suggest a re-referral to a different panel. The court declines to do so. Arbitration was seen as a practical means but as noted, given what the court perceives to be practices not in harmony with civil litigation, only orders will suffice to control the conduct evidently, and those do not seem very effective given interpretations of various participants.

As to the arguments about other reasons for dismissal, they are all rejected as lacking merit. Defendant actually quotes the "mandatary" language of Rule 65A on at least two occasions, relative to the requirements for bond, but leaves out the language, well known to the court and obvious from even a casual

reading, that a bond is not needed in all cases and is not in fact mandatory. Defendant quotes the "shall" provision but on each occasion leaves out the "unless" provision that such security is not needed if it appears that none of the parties will incur or suffer costs, fees, or damage as a result of ay wrongful order, or unless there exists same other substantial reason for dispensing with the requirement of security.

At argument defendant argued the court did not at that time

-29-

set forth reasons for the waiver of the bond requirement. Of course defendant himself waived any claim to error when he failed to even argue the merits to the TRO, insisting wrongly under Rule 12(b) that he was there only to contest jurisdiction. Defendant waived any claim to defect in the TRO as he did not raise any claims.

Moreover, while the court did not address those reasons for not requiring security, and defendant did NOT request a bond in his arguments, it is apparent from the face of things herein that this Association, even if a TRO is wrongly issued, would be responsible for any damages occasioned by the wrongful issuance of the TRO. At the time the TRO was issued the court was dealing with a hole in the ground. Since September 16, 2005 evidently but the court is not finding such, . concrete has been poured. Given the state of affairs at the time of the order, a bond was not and is not required because it appears that any damages which may result could be covered by the Association and those would be minimal. To argue that a bond is REQUIRED in all instances is misdirected and wrong and counsel should know that. Arguing that a bond is, always mandatory iś simply wrong.

This court's jurisdiction is not foreclosed or

eliminated by an interim award from the panel under the facts of this case. The award is invalid and vacated for the reasons stated above.
-30-

The motion to dismiss is DENIED.

3. Order to show cause.

The court will not currently rule on this request. Having been served DeCarlo and Reich were present. The court indicated those persons could leave as the court was not going to entertain the order to show cause. Despite that, come comments are given.

Defendant in opposing the order to show cause is relying on arguments rejected by the court. The motion to quash and to dismiss have been denied.

There is no requirement that a TRO be served on the person enjoined before it is effective. Where defendant got that argument is unknown, and no citation is given for such a proposition. The court ordered that work cease in open court on September 16, 2005, that defendant and his agents stop work. It was discussed and gone over several times. Arbitration was then to occur and hopefully the problem solved. For defendant to argue in his pleadings that DeCarlo was not a party and cannot be ordered to stop work is an offensive and specious argument. There would obviously be no such thing as a valid court order of most any kind, especially in a TRO situation, or for that matter, any other situation, if a person enjoined said, "Well, I am not pouring cement, it is someone else, namely, my architect who is not a party." To even argue that is offensive. Mr. Rich and his
-31-
agents were ordered to stop work. DeCarlo knew that, was told that, and so that is imputed to Rich because he had counsel. The argument that to be valid it must

be served on Rich is without merit. If Mr. Snuffer did not tell his client, then something is wrong. Mr. Snuffer in open court on October 5, 2005,stated in fact that he had not told Rich what the TRO said but said that he, Rich, could expect one to be served on him. Whatever consequences are to flow from that series of events, if in fact that is the series, remains for another day. Defendant argued October 5 that the court stated the TRO had to be served on defendant. In the September 16, 2005, hearing, the court was not talking about serving the TRO as nothing in Rule 65A requires personal service of a TRO before it is effective.

Defendant is entitled to challenge the court's jurisdiction all he desires and he has made it known for some unknown reason that an appellate court will examine the issue. Just what that statement is suppose to accomplish with this court is unclear. Still, while it is the order of the court and unless and until another court tells the court it is wrong about its jurisdiction, it is the order of the court. Work has been enjoined and Mr. Rich is not to claim he is not doing the work, someone else is. Those ordered to desist work, and those responsible to tell them so, should act as if court orders and judgments mean something, even if those orders are believed to be in error. Unless and

until a stay is granted, the court orders remain in place. No stay has been granted.

The court need not, in a TRO such as this where construction is halted, name every possible worker who works on the job. DeCarlo knew he was not to work and evidently on the advice of counsel continued work. The court finds it unfathomable that DeCarlo would be advised of the TRO and on his own decide, to go ahead with the work and have a crew pour cement. The court is not in possession of sufficient facts at this point to

determine who told what to who after issuance of the TRO. The above comments are a guide to future behavior hopefully.

Having said all of the above, the court is not acting now on the request for an order to show cause. The court ordered that the order to show cause be served on DeCarlo and Reich and that Rich and Mr. Snuffer could be served by mail. That was done. As noted above, despite the repeated statements of counsel that he was engaged only to deal with jurisdiction, and that is all he argued at the September 16, 2005, hearing, and that he was engaged only to deal with the motions on October 6, 2005, Mr. Snuffer is counsel for Rich. He can challenge jurisdiction all he desires but notice to Mr. Snuffer is noticed to Mr. Rich. Mr. Snuffer was present, as was DeCarlo and Reich. Mr. Rich was not and the reasoning behind that escapes the court. If there are

consequences for failing to appear pursuant to an order to show cause served on counsel that will also remain for another day. Still, the court is not acting at this point on the request for contempt.

The court is of the belief that if plaintiffs desire to pursue these allegations of contempt against any named parties or any others involved in the construction or arbitration, that can be accomplished at anytime in an amended request for order to show cause after further discovery reveals just who was told what and who ordered what conduct. Any future proceedings can be in this action even if this action terminates on the merits.

The request for contempt is RESERVED.

As noted, the court does not believe arbitration is now viable. Accordingly, the next step is for the court to consider whether a preliminary injunction should issue. In open court on October 6, 2005, the court attempted, in the event that the motions of defendant were denied, to set a date for such an evidentiary hearing in case such a hearing was needed the court having not determined how it would rule at that point. Neither party was very amenable, one having a busy schedule and the other not having his calendar present.

-34-

The matter must be set IMMEDIATELY for an evidentiary hearing on request for preliminary injunction. Counsel need to contact the scheduling clerk immediately and a phone conference should be arranged immediately so a hearing date can be set. Rule 65A requires that a hearing be set at the earliest possible time and that such a hearing takes precedence over all other civil matters except older matters of the same character. The court is perfectly willing to schedule a hearing as soon as possible but the parties need to cooperate. If the rule requires the court to set an early hearing, the court will do so and counsel may well have to change their schedules so the rule can be complied with.

The TRO remains in effect until that can be heard and resolved. The TRO is extended because of the history set forth above. Arbitration was to occur, events transpired as they did, and there have been motions dealing with jurisdiction. All of the foregoing are reasons for extending the TRO until a hearing can be arranged for a preliminary injunction.

In addition the court will hear evidence relating

to the motion to quash at this hearing. If defendant does not produce live testimony the court will rule in favor of plaintiffs on the motion to quash based on the presumption of regularity. If

-35-

defendant produces witnesses plaintiff should be prepared to do so also as if Rich testifies as this affidavit indicates that will overcome the presumption. If the process server testifies then the court will be required and able to make a credibility determination. The court will not schedule a prior hearing on this motion alone before the preliminary injunction, in an effort to speedily determine all issues. To schedule an evidentiary hearing on the motion to quash would delay the preliminary injunction hearing. For that reason, the hearing to be scheduled will consider the preliminary injunction as well as the evidence relating to the motion to quash.

This Ruling and Order is the Order of the court and no other order is required.

DATED this 6 day of Oct., 2005.

BY THE COURT:

S/ Bruce C. Lubeck
BRUCE C. LUBECK
DISTRICT COURT JUDGE

-36-

CERTIFICATE OF NOTIFICATION
I certify that a copy of the attached document was sent to the following people for case 050500426 by the method and on the date specified.

METHOD	NAME
Mail	DENVER C SNUFFER Attorney DEF 10885 S STATE ST SANDY UT 84070
Mail	JOSEPH E TESCH Attorney PLA 314 MAIN ST STE 200 PARK CITY UT 84060

DATED this 6th Day of October, 2005.

Luwen K. Lee
Deputy Court Clerk

6. Memorandum in Support of Defendant's Renewed Motion to Dismiss.

Denver C. Snuffer, Jr. (#3032)
NELSON, SNUFFER, DAHLE & POULSEN
10885 South State
Sandy, Utah 84070
Telephone: (801) 576-1400
Facsimile: (801) 576-1960

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JAMES J. KENNY, PATRICIA D. KENNY, JAMES E. B. STUART, EILEEN A. STUART, ROBERT C. SLETTOM, FAY SLETTOM, RICHARD L. MEASELLE, CHASE PETERSON, GRETHE B. PETERSON,

PLAINTIFFS.

V.

JOHN L. RICH,

DEFENDANT

MEMORANDUM IN SUPPORT OF DEFENDANT'S RENEWED MOTION TO DISMISS

CASE NO. 05050428
JUDGE BRUCE C. LUBECK

Defendant John L. Rich (hereinafter "Defendant"), by and through his attorneys of record, Denver C. Snuffer, Jr., and the law firm of Nelson, Snuffer, Dahle and Poulsen and appears specially and for the limited purpose of Moving this Court to Dismiss the Complaint for Declaratory and Injunctive Relief and Jury Demand as follows:

1

FACTS

1. Plaintiff has brought a complaint to enforce compliance with a Declaration of Protective Covenants for Thaynes Canyon Subdivision. *See attached Exhibit 1.* The Declaration of Protective Covenants for Thaynes Canyon Subdivision ¶ 8.3 clearly states:

> 8.3 Arbitration of Disputes: All controversies arising under or with respect to this Declaration or any Supplemental or Amended Declaration shall be submitted to arbitration in accordance with the following procedure. All determinations, decisions and actions of the Association, of the Board of Trustees of the Association, or of Declarant or of Members at any meeting of such Members which is made or taken or purportedly made or taken under or pursuant to any provision of or with respect to this Declaration shall be binding and conclusive on every person, including the Association, Declarant, and each owner of property and each such owner's heirs, personal representatives, successors and assigns unless notice of dispute is given as herein provided and the matter is submitted to arbitration in accordance with the following procedure.
>
> Any party desiring to arbitrate any controversy shall file written notice of his desire

> with the Association and any party desiring to dispute any determination, decision or action as aforesaid shall file a written notice of the existence and nature of the dispute with the Association within 30 days after he discovers, learns or has notice of such determination, decision or action.
>
> [T]he decision of a majority of the arbitrators shall be binding and conclusive on all parties.

2. This matter has now been arbitrated and the decision of the arbitration panel is attached hereto as Exhibit 2.

3. This matter now having been disposed of by arbitration, there is nothing remaining for the Court to decide or consider.

ARGUMENT

Because of the disagreement between the parties, and pursuant to The Declaration of Protective Covenants for Thaynes Canyon Subdivision ¶ 8.3, this matter should be and has been arbitrated. Arbitration has jurisdiction according to the terms of the agreement and the parties have submitted this matter to binding arbitration. The decision of the arbitrators is binding, and intervention of this Court is not necessary. This case is now moot and should be dismissed.

CONCLUSION

Therefore Plaintiffs' Complaint for Declaratory and Injunctive Relief and Jury Trial should be dismissed under Rule 12(b)(1) of the Utah Rules of Civil Procedure for the lack of jurisdiction. Furthermore, Defendant should be awarded attorney fees and costs in defending this matter being brought improperly before this Court.

DATED this 29 day of September, 2005.

NELSON, SNUFFER, DAHLE & POULSEN

S/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Nelson, Snuffer, Dahle & Poulsen, P.C. and that I caused to either be placed in the United States mail, first class, postage prepaid; faxed; and/or hand-delivered; a true and correct copy of the foregoing to the following:

R. Christian Hague
Paul R. Poulsen
TESCH LAW OFFICES, P.C.
314 Main Street, Suite 201
P.O. Box 3390
Park City, Utah 84060-3390

Sent via:
_____ Mail
_____ Facsimile
_____ Hand-delivery

DATED this _____ day of September, 2005.

S/ Sandra Berryhill

EXHIBIT 1

VIII. GENERAL PROVISIONS.

8.1 Duration of Declaration: Any provision, covenant, condition or restriction contained in this Declaration or any Supplemental or Amended Declaration which is subject to the common law rule sometimes referred to as the rule against perpetuities, shall continue and remain in full force and effect for the period of fifth years or until this Declaration is terminated as hereinafter provided, whichever first occurs. All other provisions, covenants, conditions and restrictions contained in this Declaration or in any Supplemental or Amended Declaration shall continue and remain in full force and effect until January 1, 2021 A.D., provided, however, that unless at least one year prior to said time of expiration, there is recorded an instrument directing the termination of this Declaration, executed by the owners of not less that two-thirds of the Lots then subject to this Declaration, said other provisions, covenants, conditions and restrictions shall continue automatically for an additional ten years and thereafter for successive periods of ten years unless, at least one year prior to the expiration of any such extended period of duration, this Declaration is terminated by recorded instrument directing termination signed by the owners of not less than two-thirds of the Lots then subject to this Declaration as aforesaid.

8.2 Amendment or Revocation: At any time while any provision, covenant, condition or restriction contained in this Declaration or any Supplemental or Amended Declaration is in force and effect, it may be amended or repealed by the recording of a written instrument specifying the amendment or the repeal,

executed by the owners of not less than two-thirds of the Lots then subject to this Declaration. No such amendment or repeal shall be effective with respect to the holder or successor or assign of the holder of a mortgage or deed of trust recorded prior to recording of the instrument specifying the amendment or repeal unless such holder executes the said instrument.

8.3 Arbitration of Disputes: All controversies arising under or with respect to the Declaration or any Supplemental or Amended Declaration shall be submitted to arbitration

in accordance with the following procedure. All determinations, decisions and actions of the Association, of the Board of Trustees of the Association, or of Declarant or of Members at any meeting of such Members which is made or taken or purportedly made or taken under or pursuant to any provision of or with respect to this Declaration shall be binding and conclusive on every person including the Association, Declarant, and each owner of property and each such owner's heirs, personal representatives, successors and assigns unless notice of dispute is given as herein provided and the matter is submitted to arbitration in accordance with the following procedure.

Any party desiring to arbitrate any controversy shall file written notice of his desire with the Association and any party desiring to dispute any determination, decision or action as aforesaid shall file a written notice of the existence and nature of the dispute with the Association within 30 days after he discovers, learns or has notice of such determination, decision or action. As promptly as possible after

receipt of such notice, the party or parties interested in the matter or dispute shall be notified of the notice by the Association; the matter shall be heard by the Board of Trustees; if not settled or resolved at such hearing the party or parties on each side of the matter or dispute shall select an arbitrator; the arbitrators so selected shall select an additional arbitrator; the matter of dispute shall be heard by the arbitrators at a convenient location in Park City, Utah; and a decision in the arbitration shall be rendered by the arbitrators. The decision of a majority of the arbitrators shall be binding and conclusive on all parties. Any disputed determination, decision or action as aforesaid shall be upheld by the arbitrators if it si or was authorized or proper under or consistent with the overall purposes of the Declaration or any Supplemental or Amended Declaration. Costs of any arbitration shall be borne equally by the party or parties on teach side of the controversy or dispute.

8.4 Severability: Invalidity or unenforceability of any provision of this Declaration or of any Supplemental or Amended Declaration in whole or in part shall not affect the validity or enforceability of any other provision or valid and enforceable part of a

EXHIBIT 2

IN ARBITRATION

In the Matter of the Arbitration between:

THAYNE'S CANYON HOMEOWNERS ASSOCIATION ET AL.

Claimants,

vs.

JOHN L. RICH,

Respondent.

INTERIM AWARD

Arbitrators:

Kent B. Scott
David W. Slaughter
Steven K. Gordon

INTRODUCTION

THE UNDERSIGNED ARBITRATORS (the "Panel") were properly appointed pursuant to, and consistent with, paragraph 8.3 of the Declaration of Protective Covenants for the Thaynes Canyon Subdivision (the "CC&Rs"), and pursuant to a written agreement of the parties dated September 21, 2005 (the "Agreement"). Pursuant to the Agreement, the Panel conducted an evidentiary hearing on September 28, 2005 in Salt Lake City, Utah. Counsel for John L.

Rich appeared at the hearing. Despite having previously agreed to the hearing date, and desptied having notice of the hearing, counsel for Thayne's Canyon Homeowner's Association (the "HOA") did not appear at, and expressly declined to participate in, the hearing. The Panel has considered the evidence and arguments of the parties, including all written memoranda, documents and arguments submitted by counsel for the HOA despite his decision not to participate in the hearing. After doing so, the Panel enters the following unanimous:

DECISION AND INTERIM AWARD

1. By entering into the Agreement, the parties properly granted the arbitration panel jurisdiction to arbitrate all claims arising under or relating to the case styled Thayne's Canyon Homeowner's Association et al. vs. John L. Rich pending in the Third District Court of Summit County, State of Utah before the Hon. Bruce C. Lubek (Case No. 050500428 MI).

ORDER - 1

2. The HOA's Request for Cancellation of Arbitration is denied.

3. The HOA's rejection of John L. Rich's request for a variance under paragraph 4.3 of the CC&Rs was unreasonable. Thus, Mr. Rich is entitled to a variance of paragraph 6.4 of the CC&Rs. Pursuant to this variance, Mr. Rich should be allowed to proceed with the addition to his home consistent with the current plans.

4. This determination renders unnecessary any ruling on Mr. Rich's arguments that the CC&Rs

have been abandoned, in whole or in part, or that the HOA has selectively and arbitrarily enforced provisions of the CC&Rs, including those governing set back requirements.

5. Because Mr. Rich is the prevailing party, he is entitled to an award of attorneys' fees and costs. Within ten days of the date of this award, counsel for Mr. Rich shall submit a memorandum of attorneys' fees and costs incurred by Mr. Rich (the "Memorandum"), and the appropriate supporting affidavit(s). Counsel for the HOA shall file a response within five days of receipt of the memorandum. Mr. Rich's counsel shall not file a reply unless requested by the Panel.

6. The parties shall pay the Panel fees as follows: David W. Slaughter and Steve K. Gordon shall be paid by the party who appointed them. Each party shall pay one half of the fees for Kent B. Scott, who was appointed as the third arbitrator by Mr. Slaughter and Mr. Gordon.

ARBITRATOR'S WRITTEN COMMENTS

The Panel provides the following comments on its own initiative to help the parties and their counsel understand the reason as for this award. These comments are not findings of fact or conclusions of law.

JURISDICTION

1. By entering into the Agreement, the parties empowered the Panel to hear this matter.

2. Subsequently, counsel for the HOA argued that the arbitration hearing was ordered by, and thereafter cancelled by, the Court.

3. Counsel for Mr. Rich argued that although the Court initially ordered the arbitration hearing, the parties subsequently consented to the arbitration hearing by signing the Agreement, which states: "I would like counsel for the parties to confirm and acknowledge by signing this letter that they have agreed to arbitrate all issues arising under Case No. 050500428 MI pending in the Third District Court for Summit County and assigned to Judge Bruce C. Lubek. In addition, I would like counsel to acknowledge the appointment and accept the following arbitration to arbitrate the issues in this case...."

4. The Panel and counsel participated in a preliminary scheduling conference on September 23, 2005. James J. Kenny, an attorney and named party plaintiff, also participated in the conference. Neither counsel for the HOA, nor Mr. Kenny, raised any objections to the Panel or the hearing. Counsel for Mr. Rich stated that he had reservations concerning the jurisdiction of the Court. However, he stated that he had no reservations about the Panel's jurisdiction or the matter being arbitrated. Thus, he agreed to the arbitration hearing.

5. At the preliminary scheduling conference, the Panel and counsel scheduled the arbitration hearing for September 28, 2005. The Panel and counsel also discussed pre-hearing matters, including the parties' execution of the Agreement, the rules applicable to the arbitration hearing, motions, discovery, exchange of witness lists and exhibits, form of the award and pre-hearing briefs. A Preliminary Scheduling Conference Order was entered and sent to

counsel.

6. Counsel for Mr. Rich executed the Agreement and added language expressly reserving Mr. Rich's challenges to the jurisdiction of the Court, but not the Panel.

7. On the afternoon before the scheduled arbitration hearing, the Panel received from Mr. Tesch a Request for Cancellation of Arbitration based upon the argument that Mr. Rich had "objected to the jurisdiction of the panel." This was not true. The Panel never received any

objection to its jurisdiction from Mr. Rich or his counsel. Mr. Tesch did not request a hearing on this issue.

8. Before the Panel could consider Mr. Tesch's request or invite a hearing on the issue, Mr. Tesch obtained an ex parte Order from the Court that: (a) set a show cause hearing before the Court on October 5; and (b) purported to cancel the "court-ordered arbitration." There was no indication in the Court's order that the Court had been informed that the parties had signed the Agreement, which confers jurisdiction on the Panel independent of any prior court order. Based on this development, late in the day on September 27, 2005, Mr. Tesch's legal assistant informed the Panel that "the hearing has been cancelled." The Panel received the Court's Order canceling the arbitration hearing at approximately 5:00 p.m.

9. The Panel then convened via telephone.

10. The Panel determined that the arbitration hearing should proceed and that counsel should be heard on the HOA's request that the Panel

cancel the arbitration hearing, and on related matters of the Panel's jurisdiction. The Panel emailed a letter to that effect to counsel, and attempted to contact both counsel by telephone.

11. On September 28, 2005, counsel for Mr. Rich was present with a witness. Counsel for the HOA did not appear. The Panel telephoned Mr. Tesch, who: (a) refused to discuss the matter with the Panel; (b) stated that he would not participate in the arbitration hearing; and (c) stated that he would stated in position in writing. Counsel for Mr. Rich reiterated that he was not objecting to the jurisdiction of the Panel and requested the arbitration hearing proceed.

12. Subsequently, the Panel received a letter from counsel for the HOA in which he stated that: (a) he considered the arbitration to be Court-ordered, and (b) the Panel had no authority to act independent of the Court.

13. Because of the Court's order canceling the hearing, the Panel was concerned about proceeding with arbitration hearing. The Panel did not want to convey any disrespect to the Court. However, after deliberating, the Panel unanimously determined that although the arbitration was initially ordered by the Court, it ceased to be Court-ordered when the parties executed the Agreement, in which they consented in writing to the arbitration of all issues in the underlying case, consented to use the arbitrators that had been appointed, and participated in a preliminary scheduling conference relating to the governance of the arbitration process. There never was an objection to arbitration hearing or to the

Panel. In fact, both parties noted technical objections to arbitration, even as ordered by the Court, but waived those objections in favor of the arbitration, and confirmed that agreement in writing.

14. In sum the arbitration hearing proceeded not pursuant to the Court's order, but rather pursuant to the Agreement (consistent with paragraph 8.3 of the CC&Rs), which granted jurisdiction to the Panel independent of any court order. The parties also participated in a preliminary hearing that resulted in the governance of the arbitration process.

15. Based on the foregoing, the Panel determines and concludes that jurisdiction of the dispute between the parties passed by written agreement to the Panel when the parties consented to the arbitration in signing the Agreement and participated in the preliminary scheduling conference.

16. This Interim Award is not intended to affect the Court's Temporary Restraining Order, Order to Show Cause or any other matters in this case. The scope of the Panel's jurisdiction is limited to the issues submitted under the Agreement, which have been decided herein.

CONCLUSION

The Panel confirms that this Interim Award is a complete disposition of all the issues submitted to them under the CC&Rs, the Court's Temporary Restraining Order dated September

ORDER - 5

16. 2005, the Agreement, and the evidence and legal arguments which were presented in connection with the arbitration hearing held in Salt Lake City, Utah

on September 28, 2005.

DATED 9/29/05 s/ Kent B. Scott
Kent B. Scott, Arbitrator and Panel Chair

DATED 9/29/05 s/ David W. Slaughter
David B. Slaughter, Arbitrator

DATED 9/29/05 s/ Steven K. Gordon
Steven K. Gordon, Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2005, a true and correct copy of the foregoing document was served by the method indicated below to the following:

Joseph E. Tesch — X U.S. Certified Mail
P. Christian Hague — Hand Delivered
Paul R. Poulsen — Overnight Mail
TESCH LAW OFFICES — X Facsimile
P.C.
314 Main Street, Suite 201
P.O. Box 3390
Park City, Utah 84060-3390
Facsimile: (435) 649-2561

Denver Snuffer — X U.S. Certified Mail
NELSON, SNUFFER — Hand Delivered
10885 South State Street — Overnight Mail
Sandy, UT 84070 — X Facsimile
Facsimile: (801) 576-1960

By: s/ Sharon Ortega

7. Trial court decision granting preliminary injunction dated November 4, 2005.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JAMES J. KENNY, PATRICIA D. KENNY, JAMES E. B. STUART, EILEEN A. STUART, ROBERT C. SLETTOM, FAY SLETTOM, RICHARD L. MEASELLE, CHASE PETERSON, GRETHE B. PETERSON,

PLAINTIFFS.

V.

JOHN L. RICH,

DEFENDANT

CASE NO. 05050428
JUDGE BRUCE LUBECK
RULING AND ORDER
DATED NOVEMBER 4, 2005

The above entitled matter came before the court for an evidentiary hearing on plaintiffs' motion for a preliminary injunction and for hearing on defendant's motion to quash on November 3, 2005. Plaintiffs were present with and through Joseph E. Tesch and Defendant was present through Denver C. Snuffer.

BACKGROUND

The court issued a Temporary Restraining Order on September 16, 2005, after a hearing at which both parties were

present. The hearing was originally scheduled for August 29, 2005, but continued at the request of defendant. The TOR enjoined defendant and his agents and servants and any person acting under or in concert with him from continuing construction of the addition

-1-

to the residence on Lot 73, Thaynes Canyon Subdivision, property known as 57 Thaynes Canyon Drive, in any manner which continues or enhances construction in the encroachment on the 10 foot side yard setback. As part of that order the court required the parties to fully cooperate with each other to complete arbitration by September 30, 2005, the court ruling in part that should occur under the Declaration. The TRO was to be in effect until further order of the court.

Whether arbitration occurred is the subject of dispute, defendant claiming an arbitration panel met and issued an award on September 28, 2005. Defendant claims that award is valid and this court has no jurisdiction to proceed. Plaintiffs did not participate in the arbitration and claim the award is a nullity based on this court's order of October 6, 2005, cancelling the arbitration previously ordered, as well as previous orders cancelling the arbitration.

Plaintiffs also filed a motion for an order to show cause, alleging construction continued on September 26, 2005, in violation of the TRO.

The court denied a motion to dismiss filed by defendants based on the arbitration dispute. Various stays have been sought by defendant from this court and appellate courts and those stays have been denied. Permission to file an interlocutory appeal by defendant has been denied by the appellate courts on more than

-2-

one occasion.

The court reserved ruling on the request for an order to show cause and reserved on the motion to quash, indicating it needed to hear evidence on whether service of process was valid.

The court ruled on October 6, 2005, that the TRO was to, remain in effect and that. a preliminary injunction heating should be held immediately. The court ruled it would hear. evidence on the preliminary injunction and. the motion to quash, and that if defendant did not produce any evidence on the question of service of process, the court would rule based on the presumption of regularity as fully described in the October 6, 2005, ruling.

A motion for stay was denied by the court, and the preliminary injunction hearing was scheduled for October 21, 2005. On October 19, 2005, defendant filed a motion under Rule 63 to disqualify the undersigned-judge. The undersigned judge referred the matter under Rule 63 to the associate presiding judge and cancelled, as was required, the October 21, 2005, hearing. The Associate Presiding Judge denied the motion to disqualify on October 25, 2005. On that date the undersigned had the clerk schedule a telephone conference to re-schedule the evidentiary hearing. That telephone conference-was set and held October 27, 2005.

In the meantime plaintiff filed a renewed motion to submit the motion to quash, arguing that as defendant had not cooperated

in expedited discovery the court should rule based on its previous comments. Plaintiffs also suggested the court consider other matters in the telephone conference.

The court conducted the telephone conference and set the evidentiary hearing for November 3, 2005, the earliest time available for counsel and the court. The court declined to rule on the motion to quash on the renewed request of plaintiffs, indicating it would hear evidence then rule. The court declined also to consider other matters in that conference.

The court heard evidence, received exhibits, heard argument of counsel, and is fully advised.

The court indicated at the conclusion of the

evidentiary. hearing that it would consider all issues, but probably enter a ruling on the motion to quash then consider the preliminary injunction further. If the motion to quash was granted, the court would act accordingly with respect to the other issues. If the motion to quash was denied, the court indicated it would consider whether it desired further evidence. At the hearing defendant produced evidence which was unanticipated by the court, evidence in summary outlined below concerning other alleged "variances" by the plaintiff HOA. The court indicated it did not know whether it would hear further evidence concerning that

-4-

issue, or whether it would rule based on the evidence adduced. The parties had discussion about closing arguments, defendant desiring to file a written closing argument and plaintiffs indicating they did not feel it was necessary. In any event, both parties gave a closing argument as to the motion to quash, but neither party gave argument relating to the preliminary injunction.

The court, as fully set out below, has concluded that it will rule on the motion to quash and on the request for preliminary injunction in this ruling, without further evidence and without further argument.

The court finds as follows:

FINDINGS OF FACT

MOTION TO QUASH

1. In August, 2005, Robert Shultz, a California Registered Process Server, an employee of a service located in Long Beach, California, was retained to attempt to serve a copy of the complaint and summons in this case on defendant at 4162 Dover Circle, Cypress, CA. Shultz is an experienced process server with over twenty years experience who serves

perhaps 500 processes per month.
-5-

2. On August 23 and 25 he attempted to serve the process but no one was at home. On August 27, 2005, at 9:30 a.m., Shultz went to the address in paragraph one above. On August 27, 2005, and before, Shultz observed a three car garage at the residence and observed a green Ford Expedition in the driveway. He also observed two other vehicles in the garage, one an older 1960s type vehicle. He went along the driveway and on a sidewalk then through a small gate and knocked on the front door. Near the door there was a sign that stated "Rich."

3. No one answered but Shultz heard a voice coming from the side of the residence asking who was there. Shultz went around to the side of the house, and from a second floor window, the only window on that side of the house, Shultz saw a woman who inquired through the open window what he wanted. He described her as a Caucasian woman, about 50 years of age, with light brown hair, average size. He explained he had papers to serve on defendant, a summons and complaint, and she stated defendant was not home. She stated she would not sign anything and would not take anything from Shultz. Shultz left the papers, including the summons and complaint and motion for temporary restraining, order, on the front porch.

4. On August 29, 2005, Shultz mailed a copy of the same materials to the same address.

5. After the TRO was issued Shultz again on September 23,
-6-
2005, went to the same address to serve defendant with the TRO and an Order to Show Cause. He arrived at approximately 6:10 a.m. and knocked and rang and the same female answered the door as had appeared in the window on August 27, 2005. She appeared in a house coat or bathrobe, and stated to Shultz that he had awakened her. Shultz asked if she was related and she said she would not sign anything and

she closed the door. Shultz left the papers on the front porch.

6. The summons left on August 27, 2005, stated that an answer must be filed within twenty (20) days. Shultz did not endorse on the papers the date and time of service.

7. Defendant's daughter, Deborah DeCarlo, testified her mother, defendant's wife, passed away approximately ten years ago and defendant did not live, with anyone. The daughter is resident of Utah and was not in California in August and September, 2005, and was last there in April, 2005, and before that in August, 2004. Deborah DeCarlo is the wife of Michael DeCarlo, the architect on this project for defendant as discussed below in other facts concerning the preliminary injunction.

8. Defendant's son Timothy Rich testified he lives in Cypress, California, approximately 1.5 miles from his father, who was not at defendant's residence on either August 27 or September 22, 2005, defendant being out of town. Timothy Rich testified that when defendant was not at home, and out of town,

-7-

Timothy went to his father's home each morning about 6:00 a.m. to check things and pick up the newspaper, and returned after work to feed the cat and bring in the mail. No one lived with defendant and no papers were found on the porch and no one was observed at 6:00 a.m. on September 22. Later by proffer and agreement it was agreed that Timothy would also say the same thing about September 23, 2005. Timothy Rich testified that his father did own a green Ford Expedition, but an Eddie Bauer Edition, not an XLT. He testified he did not talk to his father about his testimony before coming to Utah to testify.

9. In previous affidavits Shultz had stated he gave the papers on August 27 to a woman who answered the door and that he had served the TRO on September 22, not-September 23.

10. On August 28, 2005 plaintiff Kenny, who lives directly across the street from defendant's home in Park City,

the subject of this litigation, observed and photographed a green Ford Expedition with California licence plates parked in front of the residence for several days thereafter. He observed on one occasion that Michael DeCarlo drove that vehicle. DeCarlo denied ever driving that vehicle and denied defendant was in Park City in August, 2005. As noted, defendant was not present for the hearing and has not been present at any hearing conducted to date.

11. Defendant filed an affidavit, but did not appear in

court to testify. He asserted in that affidavit that he lived alone in Cypress, California, that he had no woman living ,with him nor a housekeeper nor anyone else who was a woman. He asserted his son gave him a copy of the summons and complaint having found the same on the porch and another copy in the mailbox.

12. For reasons explained below in the conclusion portion, the court finds the facts surrounding the service of process to be as testified to by Shultz rather than as testified to by the family of defendant.

MOTION FOR PRELIMINARY INJUNCTION.

1. Plaintiff HOA was created in 1971 and a Declaration of Protective Covenants (Declaration) was recorded. Other plaintiffs are members of that HOA. Thaynes Canyon I was one of the first "subdivisions" in Park City. It is an open area, with many lots adjoining a public golf course, and with open spaces and streams and creeks running through it. The lots are largely irregular throughout the subdivision.

2. Defendant owns Lot 73 in the Thaynes Canyon Subdivision, at the address of 57 Thaynes Canyon. Plaintiff Kenny lives across the street and plaintiff Stuart lives on Lot 74, adjoining defendant, and plaintiff Slettom lives in a residence on Lot 72 adjoining defendant. Other plaintiffs are

nearby. The HOA has an
-9-
architectural committee and a board of directors, or trustees, of which Kenny is the president. The architectural committee is to approve all improvements, including improvements on houses, garages, and excavating and other aspects of improvement. No improvement to a residence is to be made without approval of the architectural committee. Reasonable variances based on hardship or topography or location of property lines or foliage may be granted by the committee under the Declaration.

3. The Declaration states that "all buildings and structures on all Lots shall be setback at least 10 feet from the side and real lot lines." Sec. 6.4.

4. There are other restrictions dealing With height, usage; signage, pets, waste and nuisance, and other aspects of maintaining a neighborhood set out in the Declaration.

5. The restrictions and conditions may be enforced by any lot owner or by the HOA or by Park City, by injunctive relief. Sec. 7.1.

6. All parties took their interest in their lots after the Declaration was recorded. From other documents in the file, it appears defendant obtained his interest by warranty deed recorded February 20, 1998, as Trustee of a trust, subject to the restrictions and easements of record. As Trustee defendant then conveyed the property by quitclaim deed recorded September 9, 2003, to defendant personally.
-10-

7. Defendant was granted a building permit by Park City Planning Commission to build an addition to the residence. The Park City Municipal Code requires only a five foot setback.

8. James Stuart was a member of the trustees and on the architectural committee. On July 19, 2005, Michael DeCarlo, the son-in-law of defendant and architect on the proposed addition, presented a set of plans for the addition to Stuart. Previously DeCarlo and Stuart and a former member

James Piper, who passed away on a date unknown but evidently at the end of July or early August, 2005, had several talks with DeCarlo about the proposed addition. Those included discussions about the ten foot setback. The original design byDeCarlo showed the home addition coming straight back and off of the existing home, but upon being notified of the set back provision, DeCarlo changed the plans to "step back" the addition to that shown on the plans submitted to the architectural committee. Exhibit 4.

9. Stuart immediately noticed that the addition was shown as "6.8" (whether that is 6'8" or 6.8 feet, nearly the same, is not shown by the testimony). Stbart advised DeCarlo the plans were not in accord with the set back provision of ten feet. DeCarlo said Park City was willing to issue a permit on the drawings and Stuart asked DeCarlo to alter the plans to conform to the Declaration. DeCarlo said they were going ahead with the construction. Stuart had noted preliminary work in defendant's

-11-

yard before July 19, 2005, by way of marking and staking and painting of lines and boundaries in the yard.

10. Stuart advised others who advised Kenny who set a meeting of the board for July 21, 2005. On July 20, 2005, DeCarlo was notified of the meeting to discuss the set back problem. Stuart gave DeCarlo a copy of the Declaration on July 20, 2005.

11. Neither DeCarlo nor defendant attended the July 21, 2005, meeting, which resulted in a decision to reject the plans as violative of the ten foot set back provision. During the meeting Kenny called defendant and left a voice message that the plans were not approved. Kenny also called DeCarlo and spoke with him shortly thereafter upon a return call. Kenny told DeCarlo of the decision to reject the plan and Kenny asked. DeCarlo to consult with defendant and change the plans, as the HOA was prepared to attempt to halt the construction under the proposed plans. DeCarlo reiterated defendant's position that Park City had issued a permit and

they were going forward with construction. DeCarlo advised Kenny that they, the HOA, were just being difficult.

12. Defendant continued with the planned addition and work began. On August 12, 2005, Stuart and Kenny observed piles of dirt and measured, by use of a pole and tape measure, and found the footings were approximately 6.5 feet from the property line

-12-

shared by defendant and Stuart, just as the plans showed. Further notice was given by plaintiffs to defendant on August 14, 2005. Kenny called defendant in California and indicated he wanted to avoid litigation and asked defendant to comply with the Declaration. Defendant state he would not, that the HOA could do what it had to and he was going ahead with construction. Kenny sent a letter that same date explaining the position of the HOA to defendant.

13. The former member of the Board, Piper, kept a log of the meetings as the Declaration requires, from 1977 to the present. Upon his death Kenny has maintained possession of the log. He testified he has reviewed it (exhibit 16).

14. On August 26, counsel for defendant was on the site and observed the measurements. There is no factual dispute that the plans and in fact the construction to date encroaches on the ten foot set back, and that the addition is approximately 6.5 feet from the property line. Defendant presented no evidence otherwise. The footings in trenches and the foundation walls on top of the footings were poured in concrete sometime before the TRO was issued. This action was filed August 19, 2005, and the court attempted to schedule a hearing August 29, 2005, but that was continued at the request of defendant until September 16, 2005, when the TRO was issued.

15. On September 26, 2005, the flooring, or pad, within the

-13-

foundation walls was poured, after issuance of the TRO.

16. DeCarlo introduced evidence that the Declaration

had been abandoned and that several of the lots were in violation of the Declaration because of violation of the ten foot set back, out buildings on the premises, height violations, or other violations of the Declaration. At the end of the day the court indicated it was not certain, because the court had no knowledge. beforehand that defense would be forthcoming, how important that evidence was to the court at this juncture.

Because of the court's conclusions of law below the court does not set forth as findings the evidence relating to that defense.

The court, as discussed below, concludes that the evidence at this point is not necessary for these proceedings.

16. The subdivision, Thaynes Canyon I, is an early subdivision in Park City. It is a desirable location near the city yet it is "open" in the sense that it has open space and most of the lots adjoin a golf course.

17. Lot owners purchase lots or residences subject to the Declaration and its rules and restrictions. They are entitled to have the benefits of the Declaration as is the HOA as a whole.

Based on the above findings and discussion, the court makes

the following:

CONCLUSIONS OF LAW

MOTION TO QUASH

1. The court believes it was correct in its early assessment about service of process. Initially the court had the return of service from Shultz and so acted on the request for a TRO, "assuming" it had jurisdiction, based on the presumption of regularity concerning such service, even in the face of defendant's arguments as to lack of jurisdiction over defendant. After affidavits of defendant were filed, it was clear there was a pure credibility determination that must be made

and the court could not do that based on affidavits. Accordingly the court called for an evidentiary hearing, indicating that if defendant did not produce any evidence the presumption of regularity of service of process would carry the day for plaintiffs.

2. Defendant did produce witnesses, though not defendant. The court concludes the testimony of the daughter of defendant is of little value. The court does not discredit her believability, but her personal knowledge. The court believes that she is in a position know if her father has remarried, or if he lives alone, according to her best information and belief. However, her father is age 73 and she is approximately age 50. If defendant has someone with him in some capacity or other, it would not be

-15-

unheard of for such a fact to be kept from a daughter. Deborah DeCarlo simply has insufficient personal knowledge about whether a woman was staying in the residence of her father in California on August 27 or September 23, 2005. The court admitted the testimony, but gives it little weight. Deborah DeCarlo had not been to California to see her father for at least four months before this service was accomplished.

3. As to the testimony of Timothy Rich compared to the testimony of Robert Shultz, the court is required to find credibility based on the overall circumstances. Of course that process is one hard to put into language and words, as it is common experience for people to believe one person over another, without the ability to fully articulate the reasons for that belief.

4. Here, the reasons are as follows. Shultz is a process server of vast experience. He evidenced no indication that he had any reason to "make up" anything about this service of process. He had great detail, and he went to the residence often. His description of the home and surroundings was not challenged. He filed an affidavit previously but testified differently in some regards, with respect to the second date of service and with respect to meeting the woman at the

door. The court, contrary to the arguments of defendant, greatly credits his testimony for that very reason. Had he been creating a

-16-

"story" there was no reason whatever to change his testimony from the affidavit. The position of defendant was and is that there was no such woman, and so Shultz would know that and would know that whatever he said could not be challenged, about how tall or how old the woman was, or what was her eye color or anything else. Thus, his testimony is convincing as it appears to the court to be the product of a truthful recollection rather than a story. His reasons for the changes from the affidavits to the testimony, reading the affidavit and not being careful, are believable. Further, he made observations somewhat corroborated by independent testimony. He saw a green Ford Expedition in the driveway. That vehicle, or one amazingly like it with California plates, was observed in Park City the next day parked in front of defendant's residence in Thaynes Canyon.

5. While Timothy Rich appeared credible and appeared to be a person of substance, either he or Shultz is incorrect. Both cannot be telling the full truth. The court finds it hard to believe that he did not talk with his father about his testimony as he testified. Because the court believes Shultz is more independent and neutral than is the son of defendant and because Shultz has less reason to embellish the truth than does defendant's son, and because Shultz is otherwise corroborated and Timothy Rich is not, and because there are indications concerning the "mystery" Ford Expedition vehicle that family members may be

-17-

protecting defendant in some measure, the court credits Shultz and concludes that service of process on August 27, 2005, was proper. The presumption of regularity must be overcome by defendant and he has not proved the service of process was defective. The court concludes by a preponderance of the evidence that the service of process was proper.

6. The presumption of regularity concerning a process server, as well as the testimony of the process server, weighs more heavily than an affidavit of defendant who has given no compelling reason he could not attend. Defendant again argued at this hearing that his appearance would waive any defenses based on lack of jurisdiction. The court previously and again at this hearing indicated to defendant that Rule 12(b) specifically provides otherwise. Nevertheless, defendant was not present. The affidavit of defendant is directly contrary to evidence the court heard. The testimony presented by defendant's witnesses was insufficient to overcome the presumption of regularity and it was not as convincing as the neutral testimony of Shultz because of lack of personal knowledge and familial relationships involved.

7. Process was served on a person of suitable age and discretion residing at the residence of defendant. The court makes no findings nor conclusions as to who the woman was but concludes the service was valid upon a resident, who was in the home in the early hours of the day and who appeared to have just

-18-

awakened.

8. The error in the information on the summons, the timing set forth in the summons (out of state residents have 30, not 20, days to file an answer), does not defeat the validity of the service. Defendant had notice, he has an attorney, he is an attorney, he is in no danger of default, he has not yet filed an answer but has filed a motion to dismiss, as well as other pleadings, and there is simply no prejudice arising from the erroneous information contained on the summons as to the time he must file an answer.

Accordingly, the motion to quash service is DENIED.

MOTION FOR PRELIMINARY INJUNCTION.

1. This is a hearing for a preliminary injunction. The

court does not believe, and so concludes, that the defenses offered of abandonment of the Declaration are premature and unnecessary to this proceeding. While it goes to the element of likelihood of prevailing on the merits, there are two facets to that element under Rule 65A. Whether there has been substantial or negligible compliance with the Declaration is not an issue the court believes is controlling in this proceeding nor is it necessary that the court fully examine those facts in this hearing. It is a trial issue. Whether defendant can show

-19-

habitual violations of the Declaration, and whatever the nature of the violations, and prior enforcement or lack of enforcement by the HOA, and whether the Declaration is still viable, indeed do go to the likelihood of prevailing on the merits. However, the court concludes those are issues for trial and not for this hearing. Accordingly, the court has not asked and does not ask for further facts from defendant nor from plaintiff in response to the claim of abandonment.

2. Factually the Declaration clearly states that no building shall be built closer than 10 feet to a boundary line and that no improvements are to be made without approval of the HOA. This structure, based on the plans and the preliminary construction, is closer to the boundary than 10 feet. The construction conducted thus far shows the building walls to be approximately 6.5 feet from the boundary line.

3. To obtain a preliminary injunction under Rule 65A plaintiff must demonstrate the well known elements of that rule.

4. The harm to plaintiffs is in several respects. At its most fundamental and basic level, as articulated meaningfully and professionally by several of the plaintiffs, and in a crude but understandable vernacular, "rules is rules." Everyone should be bound by the same rules. The Declarations have meaning and are applicable to all owners in the subdivision, and if taken lightly and ignored at the desire of any lot owner who wants a grander

-20-

residence, great harm to the integrity of the subdivision and harm to individual lot owners could occur. The contemplated structure has the possibility of eliminating favorable aspects of a view by adjoining property owners. Moreover, and most importantly violations of the Declaration coulct lead to future requests for variances. and future violations that then would have a precedent, all of which are incalculable by money damages. For those reasons the threatened injury to plaintiffs is irreparable at this point.

5. The harm to plaintiffs is such that the integrity of the Declarations weighs more heavily than any possible harm to defendant. He had received warnings and was told the plans did not comply with the Declarations before any construction commenced. He was plainly told litigation would result unless he attempted to sit down and talk about the proposed plans. He proceeded at his own risk, and he was advised he was doing so. Plaintiffs sought to discuss the matter, and pleaded with defendant and his architect to modify the plans, which they did on one occasion. They refused to further modify them, so that defendant could have his addition just as he wished, with a certain size room. The court, based on argument, issued a TRO, and construction continued. The court is not dealing with that aspect in this hearing and ruling, as that may or may not arise in the context of an order to show cause proceeding at a later

-21-

time.

The issue is not what the cost may be, if the court later after trial rules for plaintiffs, to remove the structure erected in part in apparent violation of the Declaration, but the issue is what is the harm in requiring defendant, and all, others, to comply with the Declaration in the first instance. There is no harm demonstrated in requiring defendant to build his addition so that it lies at least 10 feet from a property line. At most it appears from the plans that certain rooms would have to be somewhat smaller than desired by defendant. That harm is the harm measured by the court, not the harm in "undoing" what

has been done, or in remediating what has been done.

6. The Court sees no public interest violated by enforcement at this point of the Declarations, an agreement between the individual lot owners and as a whole. In-fact the public interest is in enforcing the Declaration, enforcing contracts entered into freely.

7. The court believes that there are serious issues that require further litigation. It appears likely that plaintiffs may prevail on the merits also, but as noted the defenses presented in part by defendant go to that element. However, the court is not considering that other evidence at this point, and is not allowing rebuttal of that evidence presented, because of the other aspect of that element of Rule 65A. That is, of course,

whether there are serious issues requiring further litigation. Indeed there are such issues. Those include, as noted above, whatever defenses may be mounted, including evidence pertaining to abandonment of the Declaration by variances or violations that may exist.

10. Based on the court's findings, and the above conclusions, the preliminary injunction ought to issue on the same terms as in paragraph one (1) of the TRO. A preliminary injunction should issue, the same to remain until further order of the court.

11. The court finds a bond is required. The court can see possible damages that could arise if the preliminary injunction is wrongfully issued. The defenses offered,while not discussed and while not ruled upon in this ruling, do not appear to be wholly without substance at this point. The court is not in any way indicating that it feels the evidence presented by defendant with respect to possible abandonment of the Declaration is or is not of merit. The court realizes plaintiffs did not have an opportunity to contest the facts presented. Nevertheless, the court will require, as a condition for issuance of the preliminary injunction, that plaintiffs post a security bond in the sum of twenty thousand dollars ($20,000.00).

Plaintiffs are to prepare an order in compliance with URCP
-23-
Rule 7(f) setting forth this ruling as to the preliminary injunction.

DATED this 4th day of Nov. 2005.

BY THE COURT:

S/ Bruce C. Lubeck
BRUCE C. LUBECK
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION
I certify that a copy of the attached document was sent to the following people for case 050500426 by the method and on the date specified.

METHOD	NAME
Mail	DENVER C SNUFFER Attorney DEF 10885 S STATE ST SANDY UT 84070
By Hand	JOSEPH E TESCH Attorney PLA 314 MAIN ST STE 200 PARK CITY UT 84060-3390

DATED this 7th Day of November, 2005.

Luwen K. Lee
Deputy Court Clerk